Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MITCHELL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED FOR REVIEW

May a Massachusetts taxpayer be denied the protection of the Due Process Clause of the Fourteenth Amendment of the United States Constitution when the Massachusetts Commissioner of Revenue fails to provide taxpayer with either a pre-deprivation or prompt post-deprivation notice and hearing and seizes taxpayer's home on the "mere assertion" that the taxpayer may owe Massachusetts sales taxes.

LIST OF PARTIES TO THIS PROCEEDING

Your Petitioner in the instant proceeding is Walter R. Leger, d/b/a Office Chair Maintenance Co., Plaintiff in a proceeding originally commenced in the Massachusetts Superior Court, Worcester District, under Civil Action No. 93-2589A.

The Respondent in this proceeding is Mitchell Adams, Commissioner of Revenue of the Commonwealth of Massachusetts.

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Memorandum of Decision and Notice of Judgment Entry of Superior Court, Worcester District 10a

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

WALTER R. LEGER
d/b/a OFFICE CHAIR MAINTENANCE CO.

Petitioner,

vs.

MITCHELL ADAMS, as he is
COMMISSIONER OF REVENUE

Respondent.

Petition for Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Walter R. Leger v. Commissioner of Revenue
421 Mass. 168 (1995)

STATEMENT OF JURISDICTION

Your Petitioner appeals from the Opinion and Judgment of the Massachusetts Supreme Judicial Court filed on September 13, 1995.

Original jurisdiction for the proceeding in the Massachusetts Superior Court, Worcester District, was founded on M.G.L. c. 214, s. 1.

Review by the Massachusetts Supreme Judicial Court was pursuant to M.G.L. c. 211, s. 3.

This Petition for a Writ of Certiorari is brought pursuant to 28 U.S.C., s. 1254(1).

Pursuant to a written request made by Petitioner under Rule 22 of the Rules of the Supreme Court of the United States, an extension of thirty (30) days, to January 11, 1996, was granted through the Court by Justice Souter.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV

Section 1. ...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution,
Fourteenth Amendment, Section 1

STATUTES INVOLVED

M.G.L. c. 62C, s. 50(a)

s. 50. Liens upon property for nonpayment of taxes

(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, including any interest, additional amount, addition to tax, assessable penalty or forfeiture, together with any costs that may accrue in addition thereto, shall be a lien in favor of the commonwealth upon all property and rights to property, whether real or personal, belonging to such person. The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed or deemed to be assessed is satisfied. Said lien shall in any event terminate not later than six years from the date it was created.

STATEMENT OF THE CASE

Your Petitioner respectfully requests this Court review a decision rendered by the Massachusetts Supreme Judicial Court.

PRIOR PROCEEDINGS

A. Nature of the Case

Walter R. Leger ("Leger") did business as a sole proprietor reupholstering office chairs brought in by customers. Leger collected a sales tax from customers for materials used, but did not charge or collect a sales tax on the cost of the labor.

The Department of Revenue (the "Department") determined that Leger should have collected sales tax on the labor charges. Subsequent to a hearing before the Department's Appeal and Review Bureau (the "Appeal Bureau"), Leger was notified that the Appeal Bureau agreed with the Audit Bureau in that reupholstering constitutes a taxable sale of tangible personal property. Following this notification, and without any hearing, the Department, on or about November 6, 1992, filed a Massachusetts Tax Lien against Leger's home.

Leger contends that, absent a showing of exigent circumstances, the Constitutions of the United States and the Commonwealth of Massachusetts prohibit the Department from placing a lien on or seizing his home without first affording him either a pre-deprivation notice and

hearing or, assuming exigent circumstances, a prompt post-deprivation notice and hearing.

B. Facts and Administrative Proceedings

The facts critical to this matter were never in dispute and are largely contained in an opinion dated September 13, 1995, of the Massachusetts Supreme Judicial Court. See Leger v. Commissioner of Revenue, 421 Mass. 168 (1995).

Leger operated a sole proprietorship called Office Chair Maintenance Co. between 1975 and October 1987. Leger reupholstered worn office chairs brought in by customers. He collected a sales tax from his customers for the cost of materials, but did not charge or collect sales tax on the cost of labor.

After an examination of Leger's books by the Audit Bureau of the Department, the Department determined that Leger should have collected sales tax on the labor charges in his reupholstering business. As a result, the Department disallowed Leger's deduction for his labor charges.

The Audit Bureau of the Department sent notices of intention to assess sales and use tax for the periods October 1, 1989 through March 31, 1990, January 1, 1985 through September 30, 1985, and July 1, 1987 through September 30, 1989.

An administrative review on the substantive tax issue only was granted to Leger by the Department's Appeal and Review Bureau.[1]

Leger was notified by a letter dated April 24, 1992, of the Appeal Bureau's opinion that reupholstering constitutes the taxable sale of tangible personal property.

The Commissioner made a deficiency assessment on May 11, 1992, and mailed a notice of assessment to Leger on June 23, 1992. A demand for payment of the assessed taxes was sent to Leger on August 8, 1992, and a consolidated bill was mailed on September 1, 1992.

On September 1, 1992, Leger applied to the Commissioner, pursuant to M.G.L. c. 62C, s. 37, for an abatement of the sales tax which had been assessed. The Commissioner denied his application.

While Leger pursued these administrative remedies, he did not pay any of the contested taxes. On September 2, 1992, the Department notified Leger by a form letter (Form ID 00021) that if he failed to make payment within ten days, it would institute collection actions to

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1. The Commissioner's regulations specifically state that relief may be denied if "the relief sought would require a determination that a Massachusetts taxing statute is unconstitutional on its face." MASSTAX GUIDE ADMINISTRATIVE PROCEDURE, VOL. 5 (1993) ("DOR Admin. Proc."), s. 628.4 (1993).

secure payment of the amounts owed. The letter informed Leger that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets."

On November 6, 1992, the Department filed a notice of Massachusetts tax lien (lien notice) against Leger's residence with the Secretary of the Commonwealth under M.G.L. c. 62C, s. 50 (1994 ed.). Notice of the lien was also recorded in the Worcester District Registry of Deeds. The Department did not notify Leger that it had placed a lien on his house.

Leger first learned of the lien over a month later on December 11, 1992, when his application for an equity line of credit for the purpose of financing his company was denied by the Workers Credit Union of Fitchburg because of the tax lien. Unable to pay its debts (including the alleged tax debt), Leger's company filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts, Docket No. 93-42303, on August 24, 1993.

On December 16, 1993, and May 10, 1993, Leger filed appeals with the Appellate Tax Board ("ATB") pursuant to M.G.L. c. 62C, s. 39(c), which permits the contesting of the imposition of taxes without the payment of any portion of such proposed tax.

From November 6, 1992, to the present,[2] Leger has had *neither* a pre-deprivation notice and hearing nor a post-deprivation notice and hearing -- prompt or otherwise -- related solely to the issue of seizure.

C. Judicial Proceedings

1. Procedural History

On November 1, 1993, Leger filed a Complaint in Worcester Superior Court seeking injunctive relief, alleging that the Commissioner violated his Federal and State constitutional rights to procedural due process by denying him a prior notice and hearing before the Department encumbered his property with its lien.

Petitioner contended in his Complaint in Superior Court that the Commissioner cannot arbitrarily place a lien on his home without affording him either a pre-deprivation notice and hearing or, assuming exigent circumstances, a prompt post-deprivation notice and hearing before an impartial adjudicator as to the necessity for the lien (an issue separate and apart from the substantive issue of whether or not taxes are due and owing).

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2. This case has now been scheduled for a hearing before the ATB on May 16, 1996.

2. Summary of Superior Court Opinion

In its Memorandum of Decision and Order dated July 15, 1994, the Superior Court held that:

> ... the collection of tax by summary process, with judicial review only afforded after the assessment, does not violate due process. [citations omitted] ... The government's interest in collecting taxes is so "exceedingly strong" that a state need not provide predeprivation process, even in the absence of exigent circumstances. Slip Opinion, pages 8-9.

However, the Superior Court never addressed the issue of the lack of a post-deprivation notice and hearing -- prompt or otherwise.

3. Summary of Mass. Supreme Judicial Court Opinion

On appeal, the decision of the Superior Court was affirmed by the Massachusetts Supreme Judicial Court ("SJC"). In its opinion -- Leger v. Commissioner of Revenue, 421 Mass. 168 (1995), the SJC came to certain conclusions with which the Petitioner disagrees:

A. Even though the seizure of property is involved, a taxpayer is not entitled to any pre-deprivation notice and hearing.

> ... However, as for the assessment and collection of taxes, it is well established that postdeprivation procedures may satisfy the demands of due process. Id at 172.
>
> Allowing taxpayers to litigate the validity of assessed taxes prior to payment could pose a threat to the government's financial security, "by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." Id at 172, n. 7.

B. That if the taxpayer believes three years is too long for a prompt post-deprivation hearing to take place, the problem should be addressed by the Legislature and not the courts.

> As his final argument, Leger contends that the prospect of a long-delayed proceeding before the board violates due process. Leger does not argue that such proceedings themselves are not consonant with due process,[3] but rather that the long delay before the board considers his case will

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3. The SJC has misstated Petitioner's position. Petitioner never agreed that such proceedings on the issue of seizure before the ATB are "consonant with due process." Also, Petitioner never agreed that the attachment of a bank account or coercing of taxpayer to pay money satisfies the due process. See Leger at 173.

> frustrate the requirements of due process. This may be so, but we believe that this issue is a matter initially for the Legislature, or, one that can be addressed only when it is ripe for judicial review, in an appeal from a decision of the board.[4] Id at 175.

The U. S. Supreme Court has set forth its position on whether the Legislature affords due process protection to an individual.

> ... the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. ... The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. ... " See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985).

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4. The issue of a prompt post-deprivation hearing is moot since the SJC has determined that there is no requirement for any post-deprivation hearing -- prompt or otherwise -- absent explicit legislative action.

REASONS FOR GRANTING THE WRIT

I

A DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT CONFLICTS WITH PRIOR DUE-PROCESS DECISIONS OF THE U. S. SUPREME COURT.

The conclusion of the Massachusetts Supreme Judicial Court (the "SJC") is in conflict with the present position of the U. S. Supreme Court as follows:

1. The SJC has disregarded the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), regarding due process procedure when administrative action results in the taking of taxpayer's property;

2. The SJC has erroneously concluded that when taxes are involved, there is no need for either a pre-deprivation notice and hearing or a prompt post-deprivation notice and hearing on the issue of seizing a taxpayer's home; and

3. The SJC has misinterpreted due process of law by concluding that if there is an unusual delay in holding a prompt post-deprivation hearing, it is not the courts' responsibility to rectify the situation, but rather the responsibility of the Petitioner who must first go to the Legislature for a solution.

II

ARGUMENT

The Due Process Clause requires that before the Massachusetts Commissioner of Revenue is permitted to seize Petitioner's home on the bare assertion that taxes may be due and owing:

A. The Petitioner is to be afforded a pre-deprivation notice and hearing before an impartial tribunal.

B. If there is an extraordinary situation where some valid government interest is at stake in the particular property seized, the Petitioner is to be afforded a prompt post-deprivation notice and hearing before a judge.

A. The Petitioner is to be afforded a pre-deprivation notice and hearing before an impartial tribunal.

Petitioner contends that the general rule of due process as defined by this Court is that there must be notice and a hearing prior to a taking.

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent

> proceedings [if any]," Boddie v. Connecticut, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. Fuentes v. Shevin, 407 U.S. 67, 82 (1971).

In the instant suit, the Commissioner never alleges that the collection of the proposed tax was in jeopardy. Consequently there are no exigent circumstances justifying a taking prior to any deprivation notice and hearing.

However, assuming that an extraordinary situation may exist, it is the position of this Court that there must be a balancing of the competing interests of the Petitioner and the Massachusetts Commissioner of Revenue.

> Whether the seizure of real property [Petitioner's home] for purposes of civil forfeiture [tax collection] justifies such an exception [to the right to prior notice and a hearing] requires an examination of the competing interests at stake, along with the promptness and adequacy of later procedures. See United States v. James Daniel Good Real Property, 114 S.Ct. 492, 501 (1993).

An examination of the "competing interests at stake" referred to in Good, supra, has been set forth as three factors in Mathews v. Eldridge.

> ..., resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interest that are affected. ... More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [emphasis supplied] Id, at 335.

First, in the instant suit the private interest that will be affected is the taxpayer's home, which, by its very nature, "is a private interest of historical and continuing importance." United States v. Good Real Property, Ibid.

Second, since there has been no independent neutral hearing on the issue of seizure, the risk of erroneous deprivation is great.

> ... It makes sense to scrutinize governmental action more closely when the State stands to benefit. See Harmelin v. Michigan, 501 U.S. 957, 978, n.9 (1991).

The risk of erroneous deprivation by the action of the Commissioner is emphasized by the fact that if the Commissioner is proven wrong -- that no tax is ultimately due and owing -- the Petitioner is precluded under the present laws of the State of Massachusetts to collect damages -- he has no adequate remedy at law.

The Respondent, a public official, based on the facts herein, has qualified immunity. See Gildea v. Ellershaw, 363 Mass. 800 (1973).

Furthermore, even if this were a violation of a civil right (i.e., due process) there is still a qualified immunity as indicated in the recent case of Matthews v. Rakiey, 38 Mass. App. Ct. 490, 493 (1995).

Finally, the administrative and fiscal burdens that such an additional substitute would entail is de minimus -- i.e., having a motion heard by a court just as would any other potential creditor or placing a lien on Debtor's property. The burden of a hearing is relatively minor since the Government must provide a hearing at some point. The Court system has already been set up. See Fuentes, at 90, n. 22.

Petitioner believes that applying the test of Mathews to the facts of this case entitles him to the conclusion that there is no extraordinary circumstance which would justify denying nim a pre-deprivation notice and hearing.

The most recent U.S. Supreme Court case that upholds the Petitioner's position -- particularly in the tax collection area -- is U.S. v. Good Real Property, supra.

In Good, the Supreme Court reaffirmed "the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." (emphasis supplied). See Good at 498.

On January 31, 1985, Hawaii police officers executed a search warrant at the home of claimant James Daniel Good. The search uncovered about 89 pounds of marijuana, marijuana seeds, vials containing hashish oil and drug paraphernalia. He was sentenced to one year in jail and five years' probation. On August 8, 1989, four and one-half years after the drugs were found, the United States filed an in rem action in the United States District Court for the District of Hawaii, seeking to forfeit Good's house and the four-acre parcel on which it was situated. The United States sought forfeiture on the ground that the property had been used to commit or facilitate the commission of a Federal drug offense. On August 21, 1989 the Government seized the property without prior notice to Good or an adversary hearing.

The issue as framed by the Supreme Court was:

> ... whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth

Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. Id at 497.

The Supreme Court held:

> The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.
>
> The Government does not, and could not, dispute that the seizure of Good's home and four-acre parcel deprived him of property interests protected by the Due Process Clause. ... it [the Government] argues that the seizure of real property under the drug forfeiture laws justifies an exception to the usual due process requirement of pre-seizure notice and hearing. Id at 498-499.

The Court in Good repudiated the Government's contention that the ex parte seizure complied with the Due Process clause. It concluded that:

> The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the

> individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivation of property ..." See Fuentes v. Shevin, 407 U.S., at 80-81. Good, at 500-501.
>
> Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. Id at 500-501.

The Supreme Court in Good held that even a convicted drug felon was entitled to a hearing before the government could seize his real property on the grounds that it had been used in furtherance of his drug dealing.

Thus, absent a showing of extra-ordinary exigent circumstances, Leger, like Good, was entitled to a prior notice and a prior hearing before the lien could constitutionally be imposed against his property.

In arriving at its conclusion as to what may be exigent circumstances to justify a taking of a taxpayer's property followed by a prompt post-deprivation notice and hearing, the Court in Good indicated that the rule of executive urgency ("the prompt payment of taxes without any pre-deprivation notice and hearing") no longer exists:

> The current Internal Revenue Code prohibits the Government from levying upon a deficient taxpayer's property without first affording the taxpayer notice and an opportunity for a hearing, unless exigent circumstances indicate that delay will jeopardize the collection of taxes due.
>
> Just as the urgencies that justified summary seizure of property in the 19th century had dissipated by the time of Phillips, neither is there a plausible claim of urgency today to justify the summary seizure of real property under s. 881(a)(7). Although the Government relies to some extent on forfeitures as a means of defraying law enforcement expenses, it does not, and we think could not, justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues. Good at 505.

The Federal Internal Revenue Service ("IRS") has successfully collected revenues for decades even though the Internal Revenue Code has long required a prior hearing before an independent judicial body, unless specific exigent circumstances show that delay will jeopardize the collection of taxes due. See 26 U.S.C., s. 6212, 6213, 6851, 6861. The IRS in a tax deficiency procedure may not levy against a taxpayer's property absent exigent circumstances until the decision of the U.S. Tax Court becomes final ninety days after the decision is entered unless a timely appeal is filed and decision rendered by a U.S. Court of Appeals. See 26 U.S.C., s. 7481, 7483.

B. If there is an extraordinary situation where some valid government interest is at stake in the particular property seized, the Petitioner is to be afforded a prompt post-deprivation notice and hearing before a judge.

Meaningful Time

Even if it is assumed that a prompt post-deprivation notice and hearing is all that procedural due process requires, the next logical question to be asked is, is the post-deprivation hearing held "at a meaningful time." See Armstrong v. Manzo, 380 U.S. 545, 552 (1965).[5]

The issue is fact-specific and there can be no general rule.

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Fuentes, at 86.

In Logan v. Zimmerman Brush, 455 U.S. 422, 437 (1982), the Supreme Court held that a five-day delay which deprived employee of a statutorily created property right violated the Due Process Clause.

---

5. For further commentary on constitutional restraints on timing, see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), Justice Brennan's observations at 553-556.

In U.S. v. $8,850, 461 U.S. 555 (1982), the Court held that an 18-month delay was significant unless there was good reason shown. In that suit, the Government convinced the Court that it was trying to resolve the issue with utmost speed.

However, in reviewing the aforementioned cases, in U.S. v. $8,850 an 18-month delay was significant. It is submitted by the Petitioner that a three and a half year delay, without any Government reason, between the time of the lien being placed until the time of the tentative hearing is unconscionable and violates the "meaningful time" requirement.

In summary, it is Petitioner's contention that the Massachusetts Supreme Judicial Court has denied any pre-deprivation notice and hearing or post-deprivation notice and hearing -- prompt or otherwise -- on the issue of seizure and that the taxpayer can only seek legislative relief to his problem -- in effect, transferring taxpayer's due process protection from the courts to the Legislature.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Opinion and Judgment of the Massachusetts Supreme Judicial Court as entered in this matter.

Respectfully submitted,
Walter R. Leger, d/b/a
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Petitioner, by his Attorney

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Dated: January 8, 1996

APPENDIX

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Appendix A

Opinion and Judgment of Supreme Judicial Court for Commonwealth of Massachusetts 1a

Appendix B

Memorandum of Decision and Notice of Judgment Entry of Superior Court, Worcester District 10a

WALTER R. LEGER *vs.* COMMISSIONER OF REVENUE.

Worcester. April 5, 1995. - September 13, 1995.

Present: LIACOS, C.J., WILKINS, ABRAMS, & O'CONNOR, JJ.

Taxation, Sales and use tax, Tax lien. *Due Process of Law*, Taxation.

The attachment of a tax lien to a residence by the State Department of Revenue to secure the payment of assessed taxes without a prior judicial hearing did not violate the property owner's right to due process under the Fourteenth Amendment to the Constitution of the United States or art. 10 of the Declaration of Rights of the Massachusetts Constitution, where the attachment followed the owner's refusal to pay the taxes or to post some security for payment in lieu of the attachment and where all taxpayers' due process rights were adequately protected by the available postdeprivation procedures. [171-175]

CIVIL ACTION commenced in the Superior Court Department on November 1, 1993.

The case was heard by *Barbara A. Lenk*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Carl Emmett Baylis for the plaintiff.

Pierce O. Cray, Assistant Attorney General, for the Commissioner of Revenue.

LIACOS, C.J. The plaintiff, Walter R. Leger, filed a complaint in the Worcester Superior Court seeking declaratory and injunctive relief from a tax lien attached to his residence by the Department of Revenue (department) to secure payment of taxes allegedly owed by Leger. In Count I, Leger sought a declaration that the cost of labor in reupholstering furniture, a commercial activity in which he engaged, is a service which is not subject to the sales tax under G. L. c. 64H, §§ 1 and 2 (1994 ed.). In Count II, Leger alleged that the placing of a lien on his residence prior to a judicial

hearing was in violation of the Fourteenth Amendment to the United States Constitution and art. 10 of the Declaration of Rights of the Massachusetts Constitution. Leger moved for partial summary judgment on Count II regarding his due process rights. The Commissioner of Revenue's (commissioner's) motion to dismiss Count I under Mass. R. Civ. P. 12 (b) (1), 365 Mass. 754 (1974), for failure to exhaust administrative remedies was granted by a judge in the Superior Court.[1] With respect to Count II, the judge denied Leger's motion for summary judgment and allowed the commissioner's motion for partial judgment on the pleadings under Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), and motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).[2]

Leger appealed to the Appeals Court, claiming that the attachment of a tax lien to his residence prior to a judicial hearing violated his right to due process under the Fourteenth Amendment and art. 10. We granted his application for direct appellate review. We now affirm.

The facts as stated by the judge are these.[3] Leger operated a sole proprietorship called Office Chair Maintenance Company (company) between 1975 and October, 1987. The company reupholstered worn office chairs brought in by customers. Leger collected a sales tax from his customers for the cost of materials, but did not charge or collect sales tax on the cost of labor.

After an examination of Leger's books by the audit bureau of the department, the department determined that Leger should have collected sales tax on the labor charges in his

[1]The issue whether labor charges associated with the reupholstering of furniture are subject to sales tax under G. L. c. 64H, §§ 1 and 2, is still pending before the Appellate Tax Board.

[2]The partial judgment consisted of a declaration that the commissioner did not violate Leger's due process rights.

[3]As stated by the judge, the material facts contained in the record are not in dispute.

reupholstering business.[4] As a result, the department disallowed Leger's deduction for his labor charges. On September 14, 1990, the audit bureau sent two notices of intention to assess sales and use tax, one to the company for the period October 1, 1989, through March 31, 1990, and one to Leger doing business as the company for the periods January 1, 1985, through September 30, 1985 and July 1, 1987, through September 30, 1989. By letter dated September 17, 1990, Leger waived his right to an office conference pursuant to G. L. c. 62C, § 26 (*b*), but requested, and was granted, an administrative hearing before the department's appeal and review bureau (appeal bureau). Leger was notified by a letter dated April 24, 1992, of the appeal bureau's opinion that reupholstering constitutes the taxable sale of tangible personal property.

[4]The commissioner may assess additional taxes if it is determined that a taxpayer owes more than reported on the submitted tax return. G. L. c. 62C, § 26 (*b*) (1994 ed.). Prior to an assessment being made, the commissioner must send the taxpayer a notice of intention to assess, showing the type of tax and the relevant tax periods. *Id.* At the time of this action, a taxpayer had thirty days after the issuance of the notice to request, and be available for, a conference. According to the department's administrative procedures in place at the time of this action, the taxpayer could also request a discretionary hearing before the appeal and review bureau (appeal bureau). (According to an affidavit of the chief of the appeal bureau, these procedures were amended, effective July, 1993, to provide all taxpayers, upon request, with a preassessment hearing before the appeal bureau, and the conference is no longer an option.) The commissioner may assess the taxes once these remedies have been exhausted. G. L. c. 62C, § 26 (*b*).

When the deficiency is assessed, a lien automatically is created on the taxpayer's assets. G. L. c. 62C, § 50 (*a*) (1994 ed.). In the case of a lien on real property, however, a lien is not valid against "any mortgagee, pledgee, purchaser or judgment creditor" until notice of the lien is recorded in the registry of deeds. G. L. c. 62C, § 50 (*b*) (1994 ed.). A taxpayer may contest a deficiency assessment by requesting that the commissioner abate the assessment. G. L. c. 62C, § 37 (1994 ed.). Moreover, the taxpayer may request a hearing on the abatement request. *Id.* If the commissioner does not grant the abatement request, the taxpayer may appeal to the Appellate Tax Board (board). G. L. c. 62C, § 39 (1994 ed.). An adverse decision by the board may be appealed to the Appeals Court. G. L. c. 58A, § 13 (1994 ed.). A taxpayer may also seek declaratory relief in the Superior Court in limited circumstances. See, e.g., *Space Bldg Corp. v. Commissioner of Revenue*, 413 Mass. 445, 448-449 (1992).

The commissioner made a deficiency assessment on May 11, 1992, and mailed a notice of assessment to Leger on June 23, 1992. A demand for payment of the assessed taxes was sent to Leger on August 8, 1992, and a consolidated bill was mailed on September 1, 1992.

On September 1, 1992, Leger applied to the commissioner, pursuant to G. L. c. 62C, § 37, for an abatement of the sales tax which had been assessed. The commissioner denied his application in two separate rulings, one dated on or before December 16, 1992,[5] and the other dated April 5, 1993, each of which Leger appealed to the Appellate Tax Board (board) pursuant to G. L. c. 62C, § 39 (*c*). These issues are still pending.

While Leger pursued these administrative remedies, he did not pay any of the contested taxes. On September 2, 1992, the department notified Leger that, if he failed to make payment within ten days, it would institute collection actions to secure payment of the amounts owed. The letter informed Leger that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets." On November 6, 1992, the department filed a notice of Massachusetts tax lien (lien notice) against Leger's residence with the Secretary of the Commonwealth under G. L. c. 62C, § 50 (1994 ed.).[6] Notice of the lien was also recorded in the Worcester County registry of deeds.

Prior to the lien notice's being filed, Leger had had a hearing before the department's appeal bureau, but had had neither a determination of the commissioner's abatement decision, a hearing before the board, nor a judicial hearing.

[5]The date of the first denial is unclear in the record. Logically, it must have preceded December 16, 1992, the date when Leger filed his appeal with the board.

[6]Leger contends that he first learned of the lien on December 11, 1992, when his application for a home equity line of credit was denied because of the lien's existence. The Superior Court judge determined that this contention was not a material fact in the context of her decision.

Leger argues that he has a right, under both the Federal and Massachusetts Constitutions, to notice and a judicial hearing before a lien securing payment of taxes may be attached to his real property. We recognize that the attachment of a lien to an individual's residence affects a property interest that is protected by the due process clause of the Fourteenth Amendment. *Connecticut* v. *Doehr*, 501 U.S. 1, 12 (1991). See *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). In a case such as this one, the procedural requirements of art. 10 are substantially the same as those under the Fourteenth Amendment. *School Comm. of Hatfield* v. *Board of Educ.*, 372 Mass. 513, 514, 515 & n.2 (1977).

Generally, due process requires that an individual must receive notice and a hearing prior to governmental deprivation of property. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 500 (1993). *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). However, as for the assessment and collection of taxes, it is well established that postdeprivation procedures may satisfy the demands of due process.[7] *Reich* v. *Collins*, 115 S. Ct. 547, 550 (1994). *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 37 (1990). *Fuentes* v. *Shevin, supra* at 91-92. *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589, 595-597 (1931). *Haverhill Manor, Inc.* v. *Commissioner of Pub. Welfare*, 368 Mass. 15, 24-25, cert. denied, 423 U.S. 929 (1975). Accordingly, the commis-

[7]Allowing taxpayers to litigate the validity of assessed taxes prior to payment could pose a threat to the government's financial security, "by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 37 (1990).

Leger argues that recent decisions of the Supreme Court require us to reconsider the rule that postdeprivation proceedings in tax cases satisfy due process. E.g., *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 504 (1993); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972). The Supreme Court, however, recently reaffirmed the constitutionality of postdeprivation proceedings. *Reich* v. *Collins*, 115 S. Ct. 547, 550 (1994). Thus, Leger's argument is refuted by the Supreme Court.

sioner need not provide to Leger any forum for a hearing before collecting taxes that have been assessed.

Leger does not dispute the constitutionality of postdeprivation proceedings per se. Rather, Leger contends that where the deprivation is the attachment of a lien to real property, as opposed to the payment of money, predeprivation proceedings are necessary to satisfy due process. We are not convinced. We see no significant distinction between a deprivation by payment of money and a deprivation by attachment of a lien to real property.[8]

General Laws c. 62C, § 53 (*a*) (1994 ed.), confers authority on the commissioner to "levy upon all property and rights to property," including a person's real estate or bank account, belonging to a person who has not paid an assessed tax within ten days after demand. *Prudential-Bache Sec., Inc.* v. *Commissioner of Revenue*, 412 Mass. 243, 245 (1992). Thus, in our reported decisions, taxpayers typically have paid assessed taxes and penalties prior to participating in administrative and judicial proceedings regarding the validity of tax assessments. See, e.g., *Commissioner of Revenue* v. *Kelly-Springfield Tire Co.*, 419 Mass. 262, 264 (1994) (taxpayer paid assessment in full and then filed application for abatement); *Space Bldg. Corp.* v. *Commissioner of Revenue*, 413 Mass. 445, 446 (1992) (taxpayer paid taxes together with interest accrued and then filed applications for abatement); *Commissioner of Revenue* v. *New England Power Co.*, 411 Mass. 418, 420 (1991) (taxpayer paid adjusted assessments and then filed applications for abatement).

[8]The taxpayer's argument that due process requirements in tax deficiency cases are more stringent than those in tax collection cases is without merit. This distinction between "deficiency" and "collection" cases appears to be nothing more than a matter of semantics. In this case, for example, the department asserted that there was a deficiency in Leger's sales tax payment, so it assessed additional sales taxes and then sought to collect them. Leger disputes whether there was a deficiency and seeks to prevent the department from collecting additional taxes. Thus, this case might be called a "deficiency" case, a "collection" case, or both.

During the ten-day period following the demand for payment of the assessment, Leger could have paid the assessment in cash, or posted a bond for the amount due. Furthermore, pursuant to G. L. c. 62C, § 50 (*f*), and the department's administrative procedures, at any time following the attachment of his residence, Leger could have requested from the commissioner a release of the lien if he had offered alternative securities for the payment of the assessed taxes. Leger did not avail himself of any of these opportunities, and as a result, the department attached a lien to his property. Accordingly, it was only through Leger's refusal to pay the assessed taxes or to post some security for the payment of the assessed taxes that his real property was attached. Leger cannot now argue that he is entitled to different procedural rights from those afforded to taxpayers who pay their assessments or post bond and then argue the validity of the tax through the abatement process.

We conclude that the due process rights of Leger, like any other taxpayer, can be satisfied by postdeprivation proceedings. Although the attachment of a tax lien to his property may result in some hardship to Leger, cf. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747 (1974) (recognizing "precarious financial position" which may be faced by nonprofit entity while tax dispute is resolved), he is not in a position significantly different from a taxpayer who pays the assessment and proceeds with postdeprivation remedies. Leger may lose the ability to mortgage or otherwise to alienate his property, but similarly the taxpayer who pays the assessment up front loses the ability to use the money to make purchases or other investments. Leger will not receive interest as might a taxpayer who in the end is entitled to "a refund of overpayment," see 803 Code Mass. Regs. § 62C.26.1 (17) (d) (1993), but he retains the ability to use and enjoy his property, albeit to a lesser extent.

As the record in this case demonstrates, the procedures used by the department clearly notified Leger that, if he failed to pay the assessment within ten days of the demand, his property would be attached. Indeed, G. L. c. 62C, § 50

(*a*), specifically provides that a tax lien "shall arise [on all property of the taxpayer] at the time the assessment is made or deemed to be made." Leger received this demand for payment after he had participated in proceedings before the appeal bureau of the department.[9]

As his final argument, Leger contends that the prospect of a long-delayed proceeding before the board violates due process.[10] Leger does not argue that such proceedings themselves are not consonant with due process, but rather that the long delay before the board considers his case will frustrate the requirements of due process. This may be so, but we believe that this issue is a matter initially for the Legislature, or, one that can be addressed only when it is ripe for judicial review, in an appeal from a decision of the board. Cf. *Schipani* v. *Commonwealth*, 382 Mass. 685, 686 (1980) (affirming single justice's dismissal of action where factual record not adequate enough to address constitutional claim).

The judgment allowing the commissioner's motion to dismiss is affirmed.

So ordered.

[9]We need not discuss whether the proceedings before the appeal bureau, which could be characterized as a predeprivation hearing in this case, would satisfy the demands of due process.

[10]Leger asserts that even when his case is heard by the board, the board will not consider the constitutionality of the attachment of his property. In light of our treatment of the attachment as the equivalent of paying the assessment up front, we see no reason why the board would need to consider the constitutionality of the attachment.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON,

September 13, 1995

In the Case No. SJC-06772

WALTER R. LEGER

vs.

COMMISSIONER OF REVENUE

Pending in the Superior Court Department of the Trial Court for the County of Worcester -- No. 93-02589

ORDERED, that the following entry be made in the docket; viz., --

The judgment allowing the commissioner's motion to dismiss is affirmed.

BY THE COURT,

s/Susan Mellen, Asst. Clerk

September 13, 1995
SEE OPINION ON FILE.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
CIVIL ACTION
NO. 93-2589-A

WALTER R. LEGER d/b/a
OFFICE CHAIR MAINTENANCE CO.

vs.

MITCHELL ADAMS, as he is
Commissioner of Revenue

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS

The plaintiff, Walter R. Leger ("Leger"), filed this civil action seeking declaratory and injunctive relief from a tax lien filed by the defendant, the Commissioner of Revenue ("the Commissioner"), against Leger's residence for an unpaid sales tax assessment. In Count I, Leger seeks a declaration that the cost of labor in reupholstering furniture, a commercial activity in which he engages, is a service which is not subject to the sales tax under G.L. c. 64, s.s.1 and 2. Leger seeks a declaration in Count II that the Commissioner's filing of a tax lien without first providing Leger with an opportunity for a judicial hearing on the underlying tax liability violates due process as guaranteed by the Fourteenth Amendment to the United States and Article X of the Constitution of Massachusetts. Leger has moved for partial summary judgment on Count II regarding his due process rights as

guaranteed by the U.S. Constitution. The Commissioner has moved to dismiss Count I under Mass. R. Civ. P. 12(b)(1) for failure to exhaust administrative remedies. Regarding the claim for declaratory relief in Count II, the Commissioner has moved for partial judgment on the pleadings under Mass. R. Civ. P. 12(c), requesting a declaration that the Commissioner did not violate Leger's due process rights. The Commissioner has also moved to dismiss the claim for injunctive relief for Count II under Mass. R. Civ. P. 12(b)(6).

BACKGROUND[1]

Between 1975 and October 1987, Leger did business as Office Chair Maintenance Company ("the Company"), a sole proprietorship that reupholsters worn office chairs brought in by customers.[2] Leger collected a sales tax from his customers for the cost of any materials used, but did not charge or collect sales tax on the cost of the labor.

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1. As both parties have filed affidavits in support of their motions, the court will treat them as motions for summary judgment. This section contains the material undisputed facts.

2. The Court will not consider certain of Leger's allegations regarding a non-party corporation, Office Chair Maintenance, Inc., which was the sole proprietorship's successor in interest. As that corporation is presently in Chapter 7 bankruptcy proceedings, its claims may only be asserted by its bankruptcy trustee. See 11 U.S.C. s.s.541, 704.

After examining Leger's books, the Audit Bureau ("the Audit Bureau") of the Department of Revenue ("the Department") determined that the Company should have collected sales tax on the labor charges and disallowed Leger's deduction for his labor charges. On or about September 14, 1990, the Audit Bureau sent a Notice of Intention to Assess Sales and Use Tax to Walter R. Leger d/b/a Office Chair Maintenance Co. for the periods from January 1, 1985 through September 30, 1985 and July 1, 1987 through September 30, 1989. Leger waived his right to an office conference under G.L. c. 62, s.26(b), but requested an administrative hearing before the Department's Appeal and Review Bureau ("the Appeal Bureau"). The Appeal Bureau held a hearing on April 19, 1991 to consider Leger's challenge to the proposed assessment contending that reupholstering is not "fabricating personal property" subject to sales tax under G.L. c. 64H, s.s. 1 and 2 and instead is exempt as charges for personal services. In a letter dated April 24, 1992, the Appeal Bureau notified Leger that, in its opinion, reupholstering constitutes the taxable sale of tangible personal property.

On May 11, 1992 the Commissioner made a deficiency assessment. A notice of assessment was mailed to Leger on June 23, 1992, a Demand was sent out on August 8, 1992, and a consolidated bill went out on September 1, 1992. The Department notified Leger by letter dated September 2, 1992 that the Department would commence collection prcceedings against him if he failed to pay the tax assessment within ten days. The Department's letter warned

that the collection proceedings "can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizures of your assets." The Department filed a Notice of Massachusetts Tax Lien ("Lien Notice") with the Secretary of State under G.L. c. 62C, s.50 on or about November 6, 1992.[3] The Commissioner also recorded notice of the lien in the Worcester County Registry of Deeds. The lien is against Leger's residence in Fitchburg.

In early September of 1992, Leger applied pursuant to G.L. c. 62C, s.37 to the Commissioner for an abatement of the sales tax which had been assessed. The Commissioner denied Leger's abatement request in two partial decisions, one issued on or prior to December 16, 1992,[4] the other dated April 5, 1993. Leger filed appeals with the Appellate Tax Board pursuant to G.L. c. 62C, s.39(c) on December 16, 1992 and May 10, 1993. Thus, at the time the Department filed the Lien Notices, Leger had had a hearing before the Department Appeal Bureau but had not

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3. The parties dispute whether or not notice was given to Leger. Leger contends that he first learned of the lien on December 11, 1992 when his application for an equity line of credit was denied because of the lien's existence. In the context of this decision, this is not a material fact.

4. The date of the first denial is unclear from the pleadings. However, it likely preceded December 16, 1992, the date when Leger filed his appeal with the Appellate Tax Board.

had a determination of the Commissioner's abatement decision, a hearing before the Appellate Tax Board or a judicial hearing. The lien has now been in place for over a year and a half but the Appellate Tax Board has yet to issue a decision.

DISCUSSION

I. Exhaustion of Administrative Remedies

Leger seeks a declaration from the Court that reupholstering does not constitute "fabricating personal property" for purposes of G.L. c. 64H, s.1,[5] and is therefore not subject to sales tax under G.L. c. 64H, s.2.[6] The Commissioner, in contrast, has moved to dismiss this claim under Mass. R. Civ. P. 12(10)(1) for failure to exhaust his administrative remedies as provided for by various Massachusetts General Laws. Leger has failed to show why this court should

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5. Section 1 of G.L. c. 64H includes within the definition of a "sale" or "selling" transaction that is subject to the sales tax "[t]he . . . fabricating . . . of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the . . . fabricating. . . ."

6. Section 2 of G.L. c. 64H provides in relevant part: "an excise is hereby imposed upon sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of five percent. . . ."

exercise jurisdiction over this matter before it is heard by the Appellate Tax Board.

Under Massachusetts law, the Commissioner may determine that a taxpayer owes additional tax above the amount shown on a tax return and make an assessment on that amount. G.L. c. 62C, s.26(b). However, before an assessment can be made, the Commissioner must first give notice to the taxpayer of the proposed assessment. Id. The taxpayer then has 30 days to consult with the Department regarding the proposed assessment. Id.[7] At the time the Commissioner makes the deficiency assessment, a lien is automatically created. Id., s.50(a). However, the lien is only valid against "any mortgagee, pledgee, purchaser or judgment creditor" after notice of the lien has been recorded with the Registry of Deeds in the case of real estate. Id. s.50(b).

The taxpayer may contest a deficiency assessment by requesting that the Commissioner abate the assessment. Id., s.37. The taxpayer may request a hearing on the abatement request. Id. If the Commissioner fails to grant the abatement, the taxpayer may then appeal to the Appellate Tax Board. Id. at s.39. The taxpayer may appeal an adverse decision of the Appellate Tax Board to the Supreme Judicial Court. G.L. c. 58A, s.13. In limited circumstances, a taxpayer may also seek declaratory relief, under G.L. c. 231A, from the Superior Court.

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7. There are certain statutory exceptions which are not relevant here.

The statutory tax abatement procedures "are exclusive, absent exceptional circumstances." D'Errico v. Board of Assessors of Woburn, 384 Mass. 301, 306 (1981). Exhaustion is generally required unless the administrative remedy is seriously inadequate, the issue at stake is important, novel, or recurrent, the decision has public significance affecting many taxpayers or the case is reduced purely to a question of law. Space Building Corp. v. Commissioner of Revenue, 413 Mass. 445, 448 (1992). This court has discretion to hear such claims, id., but doing so is generally disfavored. Ralph's Wonder, Inc. v. Commissioner of Revenue, 19 Mass. App. Ct. 928, 929 (1984). See S.J. Groves & Sons Co. v. State Tax Commission, 372 Mass. 140, 143 (1977) (while Superior Court consideration of whether certain items purchased by a contractor were exempt from sales tax was acceptable, Supreme Judicial Court "would probably have left it to the Appellate Tax Board").

In the case at bar, Leger's claim does not involve exceptional circumstances that require this court to assert jurisdiction. Instead, Leger's claim involves a technical tax issue as to which the Appellate Tax Board is "the preferred forum . . . because of its special expertise in tax matters." DiStefano, 394 Mass. at 321. The plaintiff has an adequate remedy at law by pursuing his two abatement proceedings before the Appellate Tax Board. See Bettigole v. Assessors of Springfield, 343 Mass. 223, 235 (1961); Madden v. State Tax Commission, 333 Mass. 734, 736 (1956) (declaratory relief appropriate no where assessment had been made so that no administrative remedies

were available). Thus, it would be inappropriate to order declaratory relief and Count I is, accordingly, dismissed.

II. Due Process

Leger contends that his due process rights, as guaranteed by the Fourteenth Amendment of the United States Constitution, prevent the Commissioner from placing a lien on his home without prior notice and an opportunity for him to be heard by a judge. Leger asserts that, absent exigent circumstances, the Commissioner cannot unilaterally place a lien on a taxpayer's home without first proving to a judge that the taxpayer does in fact owe unpaid taxes and there is a realistic risk that the taxpayer will hide his assets. His argument relies heavily upon the recent United States Supreme Court decision, United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). However, as discussed below, this case does not place new restrictions on the government's ability to extract taxes from its citizenry.

The placing of a lien on an individual's private residence does affect a property interest that is protected by the Fourteenth Amendment. Connecticut v. Doehr, 501 U.S. 1, 11-12 (1991); Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Like an attachment, a lien affects significant property interests. It clouds title, impairs the ability to sell or otherwise alienate the property, taints any credit rating, reduces the chance of obtaining a home equity loan or additional mortgage and may place an existing mortgage in technical default if there is an insecurity clause. Id. at 2113. Given

that the government is infringing upon a protected property interest, the crucial question becomes what process is due the taxpayer. Mathews, 424 U.S. at 332-333. The general rule is that individuals must receive notice and a hearing prior to government deprivation of their property. James Daniel Good Real Property, 114 S. Ct. at 500. Exceptions to this rule are tolerated only in "extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." Id. at 501, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

However, the Supreme Court has consistently determined that the collection of taxes by summary process, with judicial review only afforded after the assessment, does not violate due process.[8] McKesson v. Division of Alcohol Beverages & Tobacco, 496 U.S. 18, 37 (1990); G.M. Leasing Corporation v. United States, 429 U.S. 338, 352 n. 18 (1977);

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8. While the Commissioner may be legally correct in arguing that Leger has received all the constitutionally required process due him, it is clear the post-deprivation relief he has been afforded leaves much to be desired. There is evidence before the court that the Appellate Tax Board has a significant backlog which is only increasing with time. Leger himself filed his first appeal over a year and a half ago, prior to or on December 16, 1992 and a second one over a year ago, on April 5, 1993. The Appellate Tax Board has not acted on such appeals. Leger's palpable frustration with this regrettable delay is quite understandable.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974); Phillips v. Commissioner, 283 U.S. 589, 599 (1931). The government's interest in collecting taxes is so "exceedingly strong" that a state need not provide predeprivation process, even in the absence of exigent circumstances. McKesson, 496 U.S. at 37. The policy underlying this rule is the fear that allowing taxpayers to litigate their tax liabilities prior to payment "might threaten a government's financial security," by creating "unpredictable interim revenue shortfalls" and making the "ultimate collection of validly imposed taxes more difficult." Id. See also G.M. Leasing Corporation, 429 U.S. at 352 n. 18 ("[T]he very existence of government depends upon the prompt collection of revenues").

The plaintiff points to one section of the Good decision which he interprets as calling this traditional rule into question. See Good, 114 S.Ct. at 504-505. The Good decision concerned a federal civil forfeiture statute pursuant to which the government effected the ex parte seizure of a convicted drug felon's home. Id. at 499. The Supreme Court held that, absent exigent circumstances, the due process clause requires the government to provide the home owner with notice and a hearing prior to seizure of his home. Id. at 505. In its analysis, the Court rejected the government's contention that ex parte forfeitures were, like tax seizures, justified as a means of collecting revenue. Id. The Court's historical discussion of ex parte tax seizures is, however, merely dicta and cannot be viewed in the expansive manner which Leger urges. The Supreme Court

specifically noted that it reached its holding "without revisiting these [old tax] cases." Id. at 504. The dicta in Good simply cannot be fairly construed as impliedly reversing a rule of law which the Supreme Court itself affirmed as recently as 1990. McKesson Corporation, 496 U.S. at 37 "([I]t is well established that a State need not provide predeprivation process for the exaction of taxes.")

For similar reasons, Leger's claim under Article 10 of the Declaration of Rights of the Massachusetts Constitution also fails. It is well established that the due process provisions of the Massachusetts Constitution provide protection comparable to that of the Fourteenth Amendment. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270 (1992); School Committee of Hatfield v. Board of Education, 372 Mass. 513, 515 n. 2 (1977) ("The protection afforded property interests by both provisions is subject to the same analysis"). The Court has rejected arguments similar to those now proffered by Leger, albeit made under the Fourteenth Amendment and not Article 10. The Court has "repeatedly held that, to sustain the orderly functioning of government and safeguard the integrity of the public purse, tax officials may assess and collect taxes before vouchsafing the taxpayer a right to hearing and judicial review as to the legality of the assessment." Haverhill Manor, Inc. v. Commissioner of Public Welfare, 368 Mass. 15, 25 (1975), citing Old Colony Railroad Co. v. Assessors of Boston, 309 Mass. 439, 446 (1941).

ORDER

It is hereby ORDERED that the plaintiff's motion for partial summary judgment is DENIED, and the defendant's motion for partial judgment on the pleadings and motion to dismiss is ALLOWED.

/s/Barbara A. Lenk
Barbara A. Lenk
Justice of the Superior Court

Dated: July 15, 1994

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF WORCESTER
THE SUPERIOR COURT

CIVIL DOCKET NO.
WOCV93-02589

RE: Leger v Adams Commissioner

TO: Carl Emmett Baylis
27-29 Mechanic Street
Worcester MA 01608

NOTICE OF JUDGMENT ENTRY

This is to notify you that a judgment in the above-referenced action has been entered on the docket. A copy of the judgment is attached.

Dated at Worcester, Massachusetts this 17th day of October, 1995.

Loring P Lamoureux,
Clerk of the Courts

BY:
Asst Clerk (to be assigned)
Telephone: 508-756-2441,
Ext 198-FOR MOTIONS
& Ext 216-FOR TRIALS

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MICHAEL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT HARSHBARGER
Attorney General
of Massachusetts

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Question Presented

Whether the Massachusetts Commissioner of Revenue violated the Fourteenth Amendment's Due Process Clause when he placed a lien upon a taxpayer's residence to secure collection of an unpaid tax *after* he had provided the taxpayer with both notice and an administrative hearing regarding the validity of the tax?

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Pursuant to Supreme Court Rule 15, the respondent Commissioner of Revenue ("Commissioner") submits this Brief in opposition to the Petition For Writ Of Certiorari ("Pet.") of the petitioner-taxpayer Walter R. Leger ("taxpayer").

Decisions Below

The taxpayer omits from his recitation of decisions below the unreported decision of the Commissioner's Appeal and Review Bureau ("Appeal Bureau") upholding the validity of the underlying tax, which the Appeal Bureau rendered prior to the attachment of the contested lien on the taxpayer's residence, and which was in the record below. The Commissioner reproduces the Appeal Bureau's decision at pp. A-3 through A-12 of the Appendix to the Brief In Opposition ("Opp. App.").

Jurisdiction

The Court does not have jurisdiction over the post-deprivation process claim asserted in Section IIB of the Petition's Argument (Pet. pp. 21-22), as the issue was neither actually decided by the Supreme Judicial Court nor properly raised by the taxpayer below. The Commissioner does not contest the Court's jurisdiction over the pre-deprivation process claim asserted in Section IIA of the Petition's Argument (Pet. pp. 13-20) other than to note that jurisdiction lies under 28 U.S.C. § 1257, rather than 28 U.S.C. § 1254(1) as asserted at p. 2 of the Petition.

Relevant Statutes

The taxpayer omits from his recitation of pertinent statutes both M.G.L. c. 62C, §§ 26(a) and 26(b) (1st para.), which address the process that a taxpayer receives before the Commissioner makes a deficiency assessment and attaches a lien, and 50(b), which specifies that a lien does not become effective against third parties until the Commissioner has recorded it. Due to their length, the Commissioner reproduces these statutes at pp. A-1 and A-2 of the Opp. App. pursuant to Supreme Court Rule 14.1(f).

Statement of the Case

An accurate statement of the case appears in the opinion of the Supreme Judicial Court of Massachusetts at pp. 1a-4a of the Appendix To Petition For Writ Of Certiorari ("Pet. App."). Several aspects of the Supreme Judicial Court's recitation merit emphasis and/or elaboration.

1. Notwithstanding the repeated allusions in the Petition that this case involves the "seizure" of a taxpayer's home, *see* Pet. pp. i, 4, 8-9, 12-13, 15, the only collection device that the Commissioner has utilized here is the attachment and filing of a lien on the taxpayer's residence. Pet. App. pp. 2a-4a. Under Massachusetts law, the lien creates a security interest in the affected property for the amount of the unpaid tax. *See, e.g., Hurley v. Boston Railroad Holding Co.*, 315 Mass. 591, 608, 54 N.E.2d 183, 193 (1944). Separate sections of M.G.L.

c. 62C provide the Department with the right to levy upon — *i.e.*, to distrain or seize — a taxpayer's property. M.G.L. c. 62C, §§ 53, 56. The levy procedures have never been at issue in this case.

2. As noted above, the taxpayer in fact received both written notice and an Appeal Bureau hearing *before* the Commissioner assessed the tax deficiency and imposed the corresponding lien. Pet. App. pp. 3a-4a. At that hearing, the taxpayer had the right to representation, the right to present both evidence and legal argument either orally or with documents, the right to bring witnesses, and the right to question Department of Revenue officials who were present. Opp. App. pp. A-26 through A-28. The taxpayer also had the right to a written decision, *id.*, and he in fact received a lengthy ruling that addressed his substantive tax claims in depth, *id.* pp. A-3 through A-13.

3. The Petition, however, argues that a "court" hearing must precede the imposition of a lien, Pet. p. 16, as the taxpayer asserted before the Supreme Judicial Court. Pet. App. pp. 1a-2a, 5a. If accepted, the plaintiff's argument would increase dramatically — indeed by up to 70,000 cases annually — the caseload of an already overburdened Massachusetts Superior Court. Opp. App. p. A-29. Given the sheer number of liens involved, it defies reality for the Petition to assert that "[t]he fiscal and administrative burdens . . . [are] de minimis" because "[t]he court system has already been set up." Pet. p. 16.

4. The taxpayer asserts as an alternative claim that "[e]ven if it is assumed that a prompt post-deprivation notice and hearing is all that procedural due process requires," he did not receive a post-deprivation hearing "at a meaningful time." Pet.

pp. 21-22. However, he did not raise this claim in the proceedings below. Contrary to the assertion at Pet. p. 8, neither count in the taxpayer's Superior Court complaint makes any reference to post-deprivation procedures. Opp. App. pp. A-19 through A-21. The Superior Court accordingly did not adjudicate any such separate claim in its Memorandum Of Decision And Order. Pet. App. pp. 17a-20a. While the Supreme Judicial Court did reference this issue in its opinion, it expressly declined to reach the question, explaining *inter alia* that the matter was not "ripe for judicial review" and that the "factual record [was] not adequate enough to address [a] constitutional claim." Pet. App. p. 8a.[1]

Reasons for Denying the Writ

"A review on writ of certiorari is not a matter of right but of judicial discretion," which is to be invoked "only when there are special and important reasons therefor." Supreme Court Rule 10.1. No such special circumstances exist for reviewing the Supreme Judicial Court's decision here, where the taxpayer points to no conflict with the decisions of the

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[1] The taxpayer did point to a delay in post-lien proceedings before the Massachusetts Appellate Tax Board in his Superior Court summary judgment memorandum and his Supreme Judicial Court brief. However, he did so only as alleged further support for his claim that the Commissioner must hold a *pre*-deprivation hearing, rather than as a separate claim that he did not receive a sufficiently prompt post-deprivation hearing. The Commissioner accordingly did not brief such a separate claim below.

Circuit Courts of Appeal or the highest courts of other states, and where the decision indeed directly applies the settled law of this Court regarding predeprivation process. In this regard, the Court has ruled twice with the past fourteen months that in the revenue collection context, "[d]ue process . . . allows the State to maintain an exclusively postdeprivation regime." *Reich v. Collins*, 115 S.Ct. 547, 550 (1994); *accord National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. 2351, 2354 (1995). For this reason and the fact that the Court lacks jurisdiction over the taxpayer's alternative post-deprivation process claim for lack of presentation and decision below, the Court should deny the Petition.

I. THE SUPREME JUDICIAL COURT'S REJECTION OF THE PRE-DEPRIVATION HEARING CLAIM IS CONSISTENT WITH THE REPEATED DECISIONS OF THIS COURT.

Supreme Court Rule 10.1(c) states that the Court may consider certiorari review when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." These factors are manifestly absent here, where the Supreme Judicial Court's rejection of the taxpayer's pre-deprivation process claim follows directly from this Court's longstanding doctrine.

A. *As Reiterated by the Court Twice Last Term, A State Has No Due Process Obligation to Provide a Taxpayer with Any Predeprivation Hearing At All in the Tax Collection Context.*

"[I]t is well established that a State need not provide predeprivation process for the exaction of taxes." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 37 (1990). The Court has explained:

> Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies such as distress sales in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

Id.

Consistent with this principle, the Court has expressly distinguished summary tax collection procedures from private litigation prejudgment security devices such as replevin or attachment, where the Court frequently has required a predeprivation hearing. *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972)(revenue collection recognized as "extraordinary situation

[that] justif[ies] postponing . . . opportunity for a hearing"); *see also Connecticut v. Doehr*, 111 S.Ct. 2105, 2112 (1991)(emphasizing reduced nature of governmental interest in prejudgment security provisions for private litigation). This distinction follows naturally from the third element of the familiar three-part procedural due process standard, *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which inquires into "the Government's interest, including . . . the fiscal . . . burdens that the additional . . . procedural requirement would entail."[2]

The corollary of this doctrine is that a state that does not provide taxpayers with a predeprivation hearing must afford them postdeprivation procedures that contain a "clear and certain remedy." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. at 38-39. The required postdeprivation process is by no means unlimited; *McKesson* specifies that "States may avail themselves of a variety of procedural protections . . . , such as . . . enforcing relatively short statutes of limitation . . . ." *Id.* at 50. Massachusetts provides its citizens with more than ample postdeprivation relief, as any taxpayer may seek an abatement from the

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[2] The Court has thus found the governmental interest in predictable revenue collection to be "exceedingly strong" and the governmental interest in prejudgment security provisions for private litigation to be lower. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 37; *Connecticut v. Doehr*, 111 S.Ct. at 2112. As a result, a case-specific *Mathews* inquiry does not apply in the tax collection area, where there is instead a "long held" *per se* rule that "a State may employ . . . summary remedies." *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. at 37.

Department within one year after paying a challenged tax, M.G.L. c. 62C, § 37, may appeal a denial of that abatement to the Appellate Tax Board, M.G.L. c. 62C, § 39, may appeal an adverse Board ruling to the Massachusetts Appeals Court, M.G.L. c. 58A, § 13, and, if successful at any of these levels, will receive a full refund of any tax paid with interest, M.G.L. c. 62C, § 40. These postdeprivation procedures easily satisfy Fourteenth Amendment standards as articulated in *McKesson*.

The taxpayer studiously avoids *McKesson* in his Petition. He instead relies heavily upon his interpretation of *dicta* in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), asserting that *Good* is the Court's "most recent case that upholds the Petitioner's position . . . in the tax collection area." Pet. p. 17.

In reality, *Good* is not the Court's last word on the subject, as the Supreme Judicial Court noted. Pet. App. p. 5a. Fourteen months ago, the Court issued *Reich v. Collins*, 115 S.Ct. 547 (1994). That decision specifies:

> [U]nder *McKesson*, [a State] has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." *Due process*, we should add, *also allows the State to maintain an exclusively postdeprivation regime*, or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. *Such choices are generally a matter only of state law.*

Reich v. Collins, 115 S.Ct. at 550 (emphasis supplied). *Reich* also expressly recognizes that "for obvious reasons, States

ordinarily *prefer* that taxpayers pursue only postdeprivation remedies, *i.e.*, that taxpayers 'pay first, litigate later.'" *Id.* at 551 (emphasis in original).

The Court again reaffirmed *McKesson* later in its October, 1994 Term. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. 2531, 2354 (June 19, 1995). The Court stated in *National Private Truck Council*:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. . . .
>
> The reluctance to interfere with state tax collection continued in *McKesson* . . . , in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a "clear and certain remedy," . . . the states may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford post-deprivation relief (e.g., a refund) . . . .

Id. (citations omitted).

The Court could not have been clearer that the traditional tax collection doctrine permitting exclusively postdeprivation hearings remains the law of the land. Its decisions also could hardly be more recent. Given *Reich* and *National Private Truck Council*, the taxpayer's attempt to argue that *Good* establishes an entirely new due process jurisprudence for tax

collection is wholly without basis.[3]

Moreover, *Good* would not advance the taxpayers' Fourteenth Amendment position even if it were the Court's most recent decision to discuss the issue. A 123-26. *Good* addresses a federal drug forfeiture statute serving law enforcement purposes — purposes that are quite distinct from the collection of a tax, upon which the very operations of a sovereign government depend. *See id.* at 449. Furthermore, *Good*'s facts vary sharply from those in the present case, as it involves the summary seizure of real property, rather than the simple attachment of a lien. *Id.* In this markedly different context, the Court held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 505.

Good accordingly does not alter the analysis here. While the Court referenced prior decisions "permitt[ing] the ex parte seizure of real property when the Government was collecting debts or revenue," it specified that it reached its forfeiture holding "without revisiting these cases." *United States v.*

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[3] These decisions also dispose of the taxpayer's argument that the United States Internal Revenue Service ordinarily will not impose a lien until after the opportunity for a hearing. Pet. p. 20. The point is not that the Commissioner could provide a hearing prior to the imposition of its lien — he in fact already does, as summarized at pp. 13-16 *infra*. The teaching of *National Private Truck Council*, *Reich*, and *McKesson* is instead that the Fourteenth Amendment does not *require* the Commissioner to provide such a hearing. What the Internal Revenue Service does or does not do is thus entirely irrelevant.

James Daniel Good Real Property, 114 S.Ct. at 504.[4] The Court indeed expressly distinguished the tax cases by specifying that in the case before it "the Government . . . could not justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues." *Id.* at 505. As the Superior Court concluded below, quite presciently in light of *National Private Truck Council* and *Reich*, "[t]he dicta in *Good* simply cannot be fairly construed as impliedly reversing a rule of law which the Supreme Court itself affirmed as recently as 1990." Pet. App. p. 20a.[5] The Supreme Judicial Court's decision is thus entirely consistent with this Court's rulings regarding pre-deprivation process in the tax collection area.

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[4] The Court's recent reaffirmances of *McKesson* have since made it clear that even summary seizure remains entirely permissible in the tax context. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. at 2354; *Reich v. Collins*, 115 S.Ct. at 550; *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 37. As previously indicated, the Commissioner's levy powers are not at issue in this case.

[5] *Good* explicitly endorsed the summary imposition of a lis pendens in the forfeiture context. *United States v. James Daniel Good Real Property*, 114 S.Ct at 504. Given the practical similarities under Massachusetts law between a lis pendens and a lien, *see, e.g.*, *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 565, 420 N.E.2d 343, 348 (1981) (economic effects of a lis pendens "mirror" those of an attachment), *Good* actually *supports* the Commissioner's position regarding the tax lien.

B. *The Commissioner Already Provided the Taxpayer with an Administrative Hearing Before the Lien Attached, Thereby Satisfying Due Process Standards Even If a Prior Hearing Were Required.*

The taxpayer's due process claim suffers from a further fatal deficiency under the Court's case law. Prior to the imposition of the Commonwealth's tax lien, the Commissioner in fact provided the taxpayer with an administrative hearing before the Appeal Bureau. Pet. App. pp. 3a-4a. As recited at pp. 44 *supra*, the procedures that he enjoyed at that hearing included the right to representation, the right to present evidence and argument (both orally and in writing), the right to question any representative of the Commissioner present at the hearing, and a written decision. Opp. App. pp. A-26 through A-28. These procedures more than satisfy the flexible due process standard; they indeed would even suffice for termination of subsistence welfare benefits, where administrative due process requirements are at their highest. *See Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970).[6]

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[6] Subsequent to *Goldberg v. Kelly*, the Court made it clear that the procedures required by due process vary with the type of case and that the requisite level of process is at its highest when subsistence welfare benefits are at issue. *Mathews v. Eldredge*, 424 U.S. at 334, 340-42 (distinguishing *Goldberg* and holding that a predeprivation hearing is not required for the termination of disability benefits). The necessary process for a pre-lien hearing would accordingly be *less* than that set forth in *Goldberg* (if, again, one were to assume for the sake of argument that any process at all is due in the tax context). In any event, the taxpayer has made no specific challenge to the process

The Petition complains that the Appeal Bureau hearing was insufficient because it did not address "the issue of seizure," instead providing "review on the substantive tax issue only." Pet. pp. 6, 8; *see also id.* pp. 12, 15. Before the Supreme Judicial Court, the taxpayer elaborated that the adjudicator must "consider whether the lien on the specific property is appropriate in the particular case" (in addition to determining the validity of the tax) before permitting a lien. The taxpayer based his argument on the following passage in *Good*:

> The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.

United States v. James Daniel Good Real Property, 114 S.Ct. at 502.

This argument grossly misreads *Good*. As a review of the decision makes clear, the quoted passage concerns a factor used to determine whether a preforfeiture hearing is required — *i.e.*, whether a hearing has to be held at all.[7] It does *not* describe

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available before the Appeal Bureau other than the discrete points addressed *infra*.

[7] The passage thus appears in a paragraph where the *Good* Court addresses "the third consideration under *Mathews*, 'the Government's interest.'" *United States v. James Daniel Good Real Property*, 114 S.Ct. at 502 (applying tripartite standard of *Mathews v. Eldridge*, 424 U.S. at 319).

what has to be resolved *at* the hearing. Rather than the "specific property/particular case" inquiry prescribed by the taxpayer, all that is at issue in a preliminary forfeiture hearing is (1) whether there is probable cause to believe that the subject property was used for a narcotics offense and (2) whether any of the statutory defenses to forfeiture are available. *United States v. James Daniel Good Real Property*, 114 S.Ct. at 502.

Similarly, all that would be at issue in any pre-lien hearing would be a preliminary determination as to whether the assessed tax is validly due. Further inquiry would be inappropriate — by enacting the tax lien statute, the Massachusetts Legislature has already determined that a lien is an appropriate remedy for an unpaid tax. M.G.L. c. 62C, § 50. *Good* provides no basis whatsoever for impugning that legislative judgment.[8]

The taxpayer has also assailed the Appeal Bureau hearing for its alleged bias, complaining before the Supreme Judicial Court that the hearing officer was a "bureaucratic subordinate" of the Commissioner. However, simple employment by the Commissioner does not disqualify a hearing officer; it is instead well established that an agency may provide its own due process hearing. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Marcello v. Bonds*, 349 U.S. 302, 311

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[8] While the Petition also complains that the taxpayer could not have raised any constitutional issues at the Bureau hearing, Pet. p. 6 n. 1, his substantive tax claim has no constitutional dimensions, involving instead only issues of statutory and regulatory construction. Opp. App. pp. A-19 through A-21. The argument is accordingly hypothetical and not properly before the Court.

(1955). *Goldberg v. Kelly* itself specifies that even "prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker." *Goldberg v. Kelly*, 397 U.S. at 271.[9] The Appeal Bureau procedure thus fully comports with longstanding due process standards, and the Supreme Judicial Court's decision would be consistent with this Court's prior opinions even if a pre-lien hearing were in fact required.

II. THE COURT LACKS JURISDICTION OVER THE POST-DEPRIVATION HEARING CLAIM, AS IT WAS NEITHER PROPERLY RAISED NOR ACTUALLY DECIDED BELOW.

As set forth in at pp. 4-5 *supra*, the Supreme Judicial Court did not resolve — and the taxpayer did not properly raise — his alternative claim that even if post-deprivation process were all that was required, he has not received that post-deprivation process "at a meaningful time." *See* Pet. App. p. 8a. The Court accordingly lacks jurisdiction over this claim under 28 U.S.C. § 1257, as "[i]n cases coming here from state courts there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state . . . ." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). *See generally* Robert L.

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[9] *Goldberg* also cautions that the official "should not, however, have participated in making the determination under review." *Id.* This did not occur here, where the Commissioner's Audit Bureau made the initial determination to assess and the Appeal Bureau thereafter conducted the hearing. Pet. App. pp. 2a-3a.

Stern *et al.*, *Supreme Court Practice* § 3.17, at 122 (7th ed. 1993) (collecting authorities). No injustice will be worked by applying the jurisdictional rule here, where (1) the taxpayer has already enjoyed a pre-deprivation hearing on the substantive validity of the tax, *see* Section IB *supra*, and (2) the taxpayer would receive interest on any refund under M.G.L. c. 62C, § 40 if he were (a) to pay the tax to release the lien and then (b) ultimately to establish that the tax was invalid.

Conclusion

For the foregoing reasons, the Commissioner respectfully requests that the Court deny the Petition For Writ Of Certiorari.

By his attorneys,

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Of Massachusetts

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*Counsel Of Record

Date: February 14, 1996

APPENDIX TO BRIEF IN OPPOSITION

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M.G.L. c. 62C, §§ 26(a), 26(b) (1st paragraph)

Section 26. (a) Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and at the time when the return is filed or required to be filed, whichever occurs later.

(b) If the commissioner determines, from the verification of a return or otherwise, that the full amount of any tax has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was required to be filed, whichever occurs later, assess the same with interest as provided in section thirty-two to the date when the deficiency assessment is required to be paid, first giving notice of his intention to the person to be assessed. Such person or his representative may confer with the commissioner or his duly authorized representative as to the proposed assessment within thirty days after the date of such notification. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of tax remaining due the commonwealth, or any portion thereof, which he believes has not therefore [sic] been assessed.

M.G.L. c. 62C, § 50(b)

(b) The lien imposed by this section shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the commissioner:

(1) With respect to real property or fixtures, in the registry of deeds of the county where such property is situated, and

(2) With respect to personal property, in the office in which a security or financing statement or notice with respect to the property would be filed in order to perfect a mortgage or comparable nonpossessory security interest in tangible personal property belonging to the person named in the relevant notice. The filing of a notice of any such lien or of a waiver or release of any such lien shall be received and registered or recorded without payment of any fee.

April 24, 1992

Walter R. Leger, President
Office Chair Maintenance, Inc.
1146 Main Street
Fitchburg, MA 01420

Re: Walter R. Leger d/b/a Office Chair Maintenance Co. Notice of Intention to Assess Sales and Use Tax for the periods January 1, 1985 through September 30, 1985 and July 1, 1987 through September 30, 1989

Office Chair Maintenance, Inc. - Notice of Intention to Assess Sales and Use Tax for the Taxable Periods October 1, 1989 through March 31, 1990

Dear Mr. Leger:

A hearing relative to the above matter was conducted by this Bureau on April 19, 1991. The following issues have been presented for our determination:

1. Whether reupholstering constitutes the taxable sale of tangible personal property or, rather, a nontaxable service.

2. Whether the assessments for taxable periods other than the taxable period in issue and for future years should be barred from additional assessment.

For the reasons discussed below, we make the following determinations:

1. Reupholstering constitutes the taxable sale of tangible personal property.

2. All the periods in issue may be validly subjected to additional assessments.

BACKGROUND

Facts

Office Chair Maintenance Co. was founded by Walter R. Leger as a sole proprietorship in 1975. The business was incorporated as Office Chair Maintenance Inc. Sometime during October of 1987, (hereinafter Office Chair Maintenance Co. and Office Chair Maintenance, Inc. will sometimes be referred to collectively as "Taxpayers") [sic]. Office Chair Maintenance, Inc. used the original vendor registration number, issued to the sole proprietorship, Office Chair Maintenance Co., however, until October 1, 1990, at which time Mr. Leger obtained a new number in the name of Office Chair Maintenance, Inc.

For all periods in issue, Taxpayers' business was located in Fitchburg, Massachusetts. The primary activity of Taxpayers, during all relevant periods, was the reupholstering of office furniture. In typical transactions, customers provided Taxpayers with worn-out office furniture and Taxpayers returned the reupholstered furniture to their customers. Taxpayers has been separately stating the cost for materials used in the reupholstering, and collecting sales tax on that amount, but had not charged and collected sales tax with respect to separately stated charge [sic] for labor.

Procedural History

The New England Audit Bureau of the Massachusetts Department of Revenue ("the Audit Bureau") examined Taxpayers' books and records to determine compliance with General Laws Chapter 64H and 64I. As a result of this examination, the Audit Bureau determined that Taxpayers should have charged and collected sales tax on the labor charge and sent two Notices of Intention to Assess Sales and Use Tax — one to Walter R. Leger d/b/a Office Chair Maintenance Co., for the taxable periods January 1, 1985 - September 30, 1985, and one to Office Chair Maintenance Co., for the taxable periods October 1, 1989 - March 31, 1990. Both NIA's were dated September 19, 1990. By letter dated September 17, 1990, Taxpayers waived their rights to an office conference pursuant to General Laws chapter 62C, section 26b. Taxpayers subsequently requested a hearing at this Bureau and such request was granted.

DISCUSSION OF AUTHORITIES

1. *Sale of Tangible Personal Property*

General Laws Chapter 64H, section 1 defines a "sale" and "selling" to include in part:

> "the producing fabricating [sic], processing, printing or imprinting of tangible personal property for a consideration for consumers who furnished directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting".

General Laws Chapter 64H, section 1 defines "sales price" as "the total amount paid by a purchaser to a vendor as a consideration for a retail sale valued in money or otherwise. In determining the sales price the following shall apply: (a) no deduction shall be taken on account of labor or service cost."

General Laws Chapter 64H, section 1 defines a "retail sale" as "a sale of . . . tangible personal property . . . for any purpose other than resale in the regular course of business".

The Code of Massachusetts regulations defines "fabrication" at 830 CMR 64H.1.1:(3) as follows:

> Any change in the form or substance of tangible personal property, or any shape of an existing article of tangible personal property where either party to the transaction furnishes the material, is a fabrication under this regulation. A fabrication is a sale and is subject to the sales tax. **Reupholstered furniture and custom made draperies are examples of a fabrication.** (emphasis added.)

The Audit Bureau contends that because Taxpayers reupholstered furniture, the transactions in issue constitute fabrication which is a sale subject to the sales tax pursuant to 830 CMR 64H.1.1:(3). The Audit Bureau also contends that pursuant to General Laws Chapter 64H, section 1, Taxpayers may not deduct "labor or service cost" from the sales price subject to tax. The Audit Bureau concludes that the entire price charged by Taxpayers with respect to the transactions in issue is subject to tax.

Taxpayers assert that the regulation is incorrect and the sales tax is not applicable to the portion of the sales price relative to labor because reupholstering is a service. Alternatively, Taxpayers assert that the relevant transactions are not subject to tax because either (1) what they do is "refabrication" and not "fabrication" and, thus, what they do is not a "sale" within the meaning of section 1 of chapter 64H, or (2) under the pertinent case law, what they do is a "service."

With respect to the first assertion — that reupholstering is a nontaxable service — Taxpayers point to an amendment made to chapter 64H, section 1 by the Acts of 1990, chapter 121, section 42 as authority for the conclusion that their activities are services not subject to the sales tax in effect for the taxable periods in issue. Specifically, Taxpayers cite to the portion of section 1, as amended, which defines services as "a commodity consisting of activitie engaged in by a person for another person for consideration . . . ; and provided further that the term services shall be limited to the following items: . . . Miscellaneous repair services SIC(76), provided to business;."

Taxpayers further note that the Standard Industrial Classification (SIC) Code 76, referred to in the statute above, includes reupholstering and furniture repair as miscellaneous repair services. Taxpayers conclude that the legislature, in adopting the SIC 76, intended to classify reupholstering as a service.

To begin with, the portion of the statute which Taxpayers cite, as originally enacted, was to apply to periods beginning on or after September 1, 1990. It was subsequently amended to extend the effective date to March 6, 1991 and then, on March 8, 1991, it was repealed. Thus, it was only in effect for two days.

More importantly, however, the provisions which Taxpayers cite were never intended to displace or exempt transactions which the Department had previously concluded were sales of tangible personal property. In the instant matter, transactions which involve the reupholstering of furniture with

materials supplied by the taxpayers have been determined by the Department, by regulation, to be sales of tangible personal property.

Taxpayers, in the alternative, assert that "refabrication" is not a "sale" because the statute refers to "fabrication" not "refabrication" or "reupholstering." Taxpayers assert that "refabrication" is defined differently from "fabrication." Taxpayers point to a dictionary definition of "fabrication" as "a means to construct an item, to manufacture by assembling parts", (see *Random House Dictionary*, second edition). Taxpayers also point out that "RE" is a prefix from the Latin meaning "again", or "again and again" to indicate repetition. (see *Random House Dictionary*, second edition). Taxpayers conclude that the definition of refabrication is different from "fabrication."

Taxpayers have given us a definition of "fabrication" and essentially suggested that "refabrication" means to fabricate again. We find no substantive difference between "fabricating" and "fabricating again". Consequently, we determine that "refabrication", is included in the concept of "fabrication" as that term is used in General Laws Chapter 64H section 1.

Finally, Taxpayers assert that refabrication is a service pursuant to the decision in *Houghton Mifflin Company vs. State Tax Commission*, 373 Mass. 772 at 774 (1977), from which case they quote as follows:

> "Whether a particular transaction involving the transfer of property is a personal service transaction depends on the facts. Both parties argue, and we agree, that where the services and the property are inseparable, because of the integrated nature of the transaction, the character of the transaction must be analyzed to ascertain whether the buyer's basic purpose was to acquire the property which was sold to it, or to obtain the services."

Houghton Mifflin at 772.

Taxpayers assert that the "basic purpose" of the transactions at issue was "the seeking out of a skilled repair service". Taxpayers conclude that the transactions in issue are therefore services.

Based on the facts as described above, we determine that the "real object" of the transactions in issue is to obtain reupholstered furniture. This conclusion is consistent with General Laws Chapter 64H, section 1 and Code of Massachusetts regulations section 830 CMR 64H.1.1:(3). Accordingly, we determine that the transactions in issue are sales of tangible personal property as defined in Chapter 64H, section 1 and that the entire price of the transactions is subject to the sales tax under chapter 64H.

2. *Assessment of Prior Years*

Taxpayers assert that "it is inequitable for the Commissioner to be permitted to go back five (5) years, through its own inaction, to assess a sales tax on the Taxpayer. The Commissioner should be limited to the current year in question and all future years". Letter from Carl Emmett Baylis, Esq., to David O'Coin, Audit Supervisor, November 7, 1990.

General Laws Chapter 62C, section 26(b) states in part that:

> If the commissioner determines, from the verification of a return or otherwise, that the full amount of any tax has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was required to be filed, whichever occurs later, assess the same with interest as provided in section thirty-two to the date when the deficiency assessment is required to be paid, first giving notice of his intention to the person to be assessed.

General Laws Chapter 62C, section 27 states in part that:

> If, before the expiration of the time prescribed under section twenty-six for the assessment of any tax, the commissioner and the taxpayer consent in writing to extend the time for the assessment of the tax, the commissioner or his duly authorized representative may examine the

> books, papers, records, and other data of the taxpayer, may give anynotice required by section twenty-six and may assess the tax at any time prior to the expiration of the extended time. The period so extended by the commissioner and the taxpayer may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

We note that, for purposes of making additional assessments, all periods here at issue have been extended by agreements (Forms AR-37) either within three years of the filing of the sales tax returns at issue or within the time allowed by previously agreed to extensions. Accordingly, we determine that, pursuant to General Laws Chapter 62C, section 26(b) and 27, all the periods in issue are properly open for additional assessments.

This matter will be returned to the Audit Division for assessment consistent with these determinations.

Very truly yours,

COMMISSIONER OF REVENUE

by */s/ Robert B. MacPhail*
Robert B. MacPhail, Chief
Appeal & Review Bureau
Brian E. McNulty, Esq.
Hearing Officer

RBM:BEM:jt
cc: Carl E. Baylis, Esq.
Bernard F. Crowley, Jr.,
Deputy Commissioner, Audit Division
3015

COMMONWEALTH OF MASSACHUSETTS

WORCESTER,SS: SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A.NO. 93-2589-A

.....

WALTER R. LEGER d/b/a
OFFICE CHAIR MAINTENANCE CO.
Plaintiff,

vs. COMPLAINT

MITCHELL ADAMS, as he is:
COMMISSIONER OF REVENUE
Defendant.

.....

Introductory Statement

1. This is a civil action seeking declaratory and injunctive relief against the filing of a notice of tax lien against the personal residence of Plaintiff Walter R. Leger. Plaintiff seeks a declaration that the filing of such a lien before the Plaintiff had been given an opportunity for a judicial hearing on the underlying issue of tax liability violates the Fourteenth Amendment to the United States Constitution and Article X of the Constitution of Massachusetts. Plaintiff contends that (i)

reupholstering, the commercial activity in which he engages, is a service and therefore not subject to sales tax under G.L. c. 64, Sections 1 and 2 which exempt all services other than telecommunications services from sales tax; and (ii) in placing a lien on his property without first providing him with an opportunity for a judicial hearing, the Commonwealth deprived him of his property without due process of law.

2. Plaintiff Walter Leger is an individual who resides at 43 Gardner Street, Fitchburg, Massachusetts. He is a shareholder, officer and director of Office Chair Maintenance, Inc. ("OCM"), a Massachusetts corporation with its principal place of business at 1146 Main Street, Fitchburg, Massachusetts. From 1975 until OCM was incorporated in October of 1987, Leger did business as Office Chair Maintenance Company (the "Company"), a sole proprietorship that was the predecessor in interest to OCM. (Hereinafter, OCM and the Company shall sometimes be referred to collectively as the "Companies").

3. The defendant Mitchell Adams is the Commissioner of Revenue with a usual place of business at 100 Cambridge Street, Boston, Massachusetts. He is sued solely in his official capacity.

Jurisdiction

4. Jurisdiction is conferred on this Court by G.L. c. 214, Section 1. Declaratory relief is authorized by G.L. c. 231A.

Specific Allegations

5. M.G.L. c. 64H, Section 2 imposes an excise upon "sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of five percent of the gross receipts of the vendor from all such sales of such property or services..." The term "services" is limited to telecommunication services. G.L. c. 64H, Section 1. The definition of "sale" includes "the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting..." *Id.*

6. The Company was issued a vendor registration number in 1975. OCM used that registration number from the time it was incorporated until October 1, 1990 when it obtained a new number issued in its name.

7. The Company was, and since its incorporation OCM has been, engaged in refabricating or reupholstering worn office chairs owned, typically, by the customers who bring them in for refurbishing. The practice of both in billing customers was to state the cost of materials used in the reupholstering and collect a sales tax on that amount. Neither the Company nor OCM has ever charged or collected sales tax on the cost of the labor involved in the reupholstering.

8. After an examination of the Companies' books, the Audit Bureau of the Massachusetts Department of Revenue (the

"Audit Bureau") determined that the Company and OCM should have charged and collected sales tax on the labor charge. On or about September 14, 1990, the Audit Bureau sent a Notice of Intention to Assess Sales and Use Tax ("NIA") to Walter R. Leger d/b/a Office Chair Maintenance Co. for the taxable periods January 1, 1985 through September 30, 1985, and July 1, 1987 through September 30, 1989, and an NIA to OCM for the taxable periods October 1, 1989 through March 30, 1990. Copies of the NIAs are appended hereto and marked Exhibit "A".

9. The Companies waived their right to an office conference pursuant to G.L. c. 62C, Section 26b, but requested, and were granted, an administrative hearing on the issue of whether reupholstering constitutes the taxable sale of tangible personal property or, rather, as they contended, it is a nontaxable service. The hearing was held at the Audit Bureau on April 19, 1991.

10. Three hundred and seventy-one days later, in a letter to Mr. Leger dated April 24, 1992 ("Letter Ruling"), the Audit Bureau rendered its decision that reupholstering constitutes the taxable sale of tangible personal property. A copy of the Letter Ruling is appended hereto and marked Exhibit "B".

11. On September 1, 1992, the Companies applied in writing to the Commissioner of Revenue for an abatement of the sales taxes on labor the Department of Revenue ("DOR,") was demanding. The Commissioner of Revenue denied their claim for abatement for all periods except for periods ending

March 30, 1985, June 30, 1985 and September 30, 1985. See Exhibit "C".

12. In a letter dated September 2, 1992 (the "Collection Letter"), the DOR notified the Companies that if they failed to pay the outstanding amounts due within ten days, the DOR would institute collection actions to secure payment of the amounts owed. The Collection Letter informed the Companies that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets." A copy of the Collection Letter is appended hereto and marked Exhibit "D".

13. On or about November 6, 1992, the DOR filed with the Secretary of State a Notice of Massachusetts Tax Lien in the amount of $85,396.50 upon all property and rights to property belonging to Walter R. Leger. A copy of the Notice is appended hereto and marked Exhibit "E". That Notice was not sent to Mr. Leger or the Companies.

14. Leger first learned of the lien on December 11, 1992 when his application to the Worker's Credit Union of Fitchburg for an equity line of credit was denied because of the existence of the lien. See Exhibit "F".

15. On December 16, 1992, the Companies filed a Petition Under Formal Procedure with the Appellate Tax Board, Docket No. F205105 appealing the Commissioner of Revenue's denial of their claim for abatement.

16. Other than an Answer having been filed by the Commissioner, no further action or proceeding has taken place.

17. On May 10, 1993 a second Petition Under Formal Procedure was filed, Docket No. F207939 for the periods ending March 31, 1985, June 30, 1985 and September 30, 1985 subsequent to the abatement denial by the Commissioner. See Exhibit "G".

18. No Answer has been filed by the Commissioner and no further action or proceeding has taken place.

19. Walter R. Leger is directly and immediately injured by the DOR's filing of the Notice of Lien, because it has placed a cloud on the title to property belonging to him, damaged his credit rating and that of OCM, and impaired their ability to finance the operation of their business.

20. On August 24, 1993, OCM filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of Massachusetts. The Docket Number in that Court is 93-42303.

COUNT I

21. The Audit Bureau contends that reupholstering furniture is a transaction subject to the sales tax because it is the "fabricating . . . of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the . . . fabricating . . . " *See*

G.L. c. 64H, Section 1; Letter Ruling, p.4. Its position is based on the Code of Massachusetts Regulations which defines "fabrication" as follows:

> Any change in the form or substance of tangible personal roperty, or any substantial alteration in the form or shape of an existing article of tangible personal property where either party to the transaction furnishes the material, is a fabrication under this regulation. A fabrication is a sale and is subject to the sales tax. Reupholstered furniture and custom made draperies are examples of a fabrication.

830 CMR 64H.1.1:(3); See Letter Ruling, p.4.

22. The regulation is not authorized by law and the sales tax is not applicable to that portion of the sales charge which covers labor because reupholstering is a service and the only services subject to sales tax under G.L. c. 64H, Sections 1 and 2 are telecommunications services. *See* Letter Ruling, pp. 4-5.

23. The General Court passed Chapter 121 of the Acts of 1990, formally known as "An Act Establishing the Economic Stability and Recovery Compact." The purpose of that Act was to impose a sales tax on services. The General Court defined services to include " . . . miscellaneous repair services. . . " as set forth in the U.S. Standard Industrial Classasification Manual. That Manual defined miscellaneous repair service to include reupholstering and furniture repair. This statutory definition of miscellaneous repair service to

include reupholstering and furniture repair was agreed to by the Commissioner of Revenue in the Emergency Regulations dated March 5, 1991 and effective March 6, 1991, see 830 CMR 64H.1.6 (15)(e) at page 18. See Exhibit "H" attached hereto which contains the relevant pages of the Regulation — i.e., pages 1-9 and pages 16-18 — in particular, page 16 of Exhibit "H".

24. The General Court ultimately decided not to tax services and repealed the sales tax on services retroactive to March 6, 1991. *See* St. 1991, c.4.

COUNT II

25. In pressing their claim that reupholstering is not subject to sales tax and thus that they do not owe the taxes, the Companies are in the process of pursuing their statutory administrative remedies. Accordingly, they have not been entitled to seek judicial review.

26. In recording a tax lien to secure the payment of the disputed sales taxes before affording the Plaintiff and OCM the opportunity for a judicial hearing, the Commonwealth has acted in violation of the due process clauses of the constitutions of both the United States and the Commonwealth. U.S. Const. Amend. XIV; Mass, [sic] Const. art. X.

Prayers for Relief

Wherefore, the Plaintiffs pray that this Honorable Court:

1. Enter a declaration that the reupholstering done by Plaintiff is a service and not subject to sales tax under G.L. c. 64, Sections 1 and 2.

2. Enter a declaration that Defendant's filing of a tax lien against the property of Walter R. Leger before he had been given an opportunity for a judicial hearing on the underlying issue of tax liability violates the Fourteenth Amendment of the United States Constitution and Article X of the Constitution of the Commonwealth of Massachusetts.

3. Issue a permanent injunction enjoining the Commissioner, his agents, employees, attorneys and all other persons or agencies in active concert and participation with him from in any manner seeking to enforce the tax lien filed against the property of Walter R. Leger or from taking any other summary action of a similar nature against him to secure the amounts that the Commissioner claims Plaintiff and the Companies owe, until he has been given a judicial hearing on the underlying issue of tax liability; and

4. Provide such further relief as justice and equity require.

WALTER R. LEGER d/b/a OFFICE CHAIR MAINTENANCE CO.
By his attorneys,

/s/ Carl Emmett Baylis
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150 Lincoln Street
Boston, MA 02111

Dated: October 28, 1993

THE COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
C.A. 93-2589-A

WALTER R. LEGER d/b/a OFFICE
CHAIR MAINTENANCE CO.,
Plaintiff,

vs.

MITCHELL ADAMS, COMMISSIONER
OF REVENUE,
Defendant.

AFFIDAVIT

I, Robert B. MacPhail, hereby depose and say:

1. I am the Chief of the Appeal & Review Bureau of the Department of Revenue, a position I have held since January 1987. I have personal knowledge of the facts set forth herein.

2. The Appeal & Review Bureau ("A&R"), which is part

of the Department's Legal Division, conducts administrative hearings to determine whether proposed state tax assessments are proper or whether assessed taxes should be abated. The procedures governing pre-assessment cases and abatement cases are virtually identical. This affidavit deals with the process only as it relates to pre-assessment cases. Paragraphs 3 - 11 below describe the procedure presently in effect; Paragraphs 12 - [sic] describe the procedure in effect as of the plaintiff's administrative proceedings.

Referral for Hearing — Present Procedure

3. If pursuant to an audit, or otherwise, the Audit Division (or other initiating bureau) of the Department of Revenue believes that a taxpayer has under-reported its tax, normally it will issue a Notice of Intention to Assess ("NIA") a deficiency. Prior to the assessment of the deficiency, the Audit Division notifies the taxpayer that it has the statutory right to confer with the Commissioner as to the proposed assessment; that hearing, ordinarily conducted by A&R, must be requested within 30 days after the date of the NIA. G.L. c. 62C, §26(b).

4. To initiate a pre-assessment hearing, the taxpayer is requested to complete a hearing request form (Form AR-2) stating the taxpayer's claim that the proposed assessment is in error. The taxpayer is encouraged (but not required) to cite any relevant statutes, cases, and other authorities in support of its position, and may attach additional documentation.

5. The Form AR-2 and any additional documentation is returned to the Audit Division, which will transfer that information, together with the audit case file, to A&R.

The Hearing at A&R — Present Procedure

6. At A&R, the pre-assessment case is reviewed by managerial staff and assigned to a hearing officer who, after studying the matter, will schedule the case for a hearing.

7. The proceedings at the hearing are informal. It is not a hearing under Massachusetts General Laws chapter 30A. Generally, the hearing officer and the taxpayer and/or the taxpayer's authorized representative attend the hearing. A representative of the Audit Division may also attend the hearing where A&R, in a particular case, determines such attendance is warranted.

8. Usually the hearing officer summarizes the issues in the matter, asks the taxpayer to present its case, and may ask questions. At the hearing, the taxpayer may present legal arguments in writing or orally, and may present evidence either orally or with documents. He may bring witnesses with him and may ask questions of Department officials who are present. Further documentation may be submitted after the hearing. Similarly, the hearing officer may request additional information.

9. The hearing officer does not make a determination at the hearing. Rather, the matter is taken under advisement. A determination letter is drafted for review and approval by the

Chief of A&R. A final determination letter is prepared for signature by the Chief of A&R. Thereafter, the letter issues to the taxpayer; a copy is sent to the Audit Division and if a proper power of attorney has been submitted, a copy is sent to the taxpayer's representative. If the determination is adverse to the taxpayer, generally the letter includes a standard paragraph which outlines the taxpayer's further appeal rights.

10. Finally, the case file is returned to the Audit Division for disposition consistent with A&R's determination.

11. No assessment is made until after a requested hearing is held and a determination is made. G.L. c. 62C, §26(b).

Prior Procedure

12. The procedure described in Paragraphs 3 - 11 above has been in effect since July 1, 1993. Prior to that time and as of the time of the plaintiff's administrative proceedings, the pre-assessment procedures set forth in the Department's published Administrative Procedures 609 and 628, as then in effect, applied. I attach copies of said Administrative Procedures as Exhibits A and B, respectively.

13. The primary difference between the present and prior procedures is that previously the taxpayer had an "office conference" before the bureau initiating the assessment and then could request a discretionary hearing before A&R, while now the taxpayer in all instances receives a pre-assessment hearing before A&R. The procedures that applied in both the

office conference and any discretionary A&R hearing were the same as those set forth in Paragraph 8 above. No assessment would be made until after any office conference decision and, if the taxpayer requested an A&R hearing, A&R either declined to hold a hearing or issued a letter of determination after a hearing.

14. I attach copies of the Department's published Administrative Procedures 611 and 631 as Exhibits C and D, respectively.

Signed under the pains and penalties of perjury this

16th day of *March* , 1994.

/s/ Robert B. MacPhail
Robert B. MacPhail
Chief, Appeal & Review Bureau

WORCESTER, SS. SUPERIOR COURT
C.A. 93-2589-A

WALTER R. LEGER d/b/a OFFICE CHAIR MAINTENANCE CO. V. COMMISSIONER OF REVENUE

AFFIDAVIT

I, Bernard F. Crowley, hereby depose and say that:

1. I am the Deputy Commissioner of the Audit Division of the Massachusetts Department of Revenue.

2. I have held this position since *September , 1988.*

3. Part of my responsibilities is oversight of the audit and assessment functions of the Department of Revenue.

4. Annually, the Department of Revenue makes *[symbol for "more than"] 70,000* audit assessments.

Signed under the pains and penalties of perjury this *10th* day of March 1994.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr
Deputy Commissioner

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

No. 95-1117

In the
Supreme Court of the United States
OCTOBER TERM, 1995

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MITCHELL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May a Massachusetts taxpayer be denied the protection of the Due Process Clause of the Fourteenth Amendment of the United States Constitution when the Massachusetts Commissioner of Revenue fails to provide taxpayer with either a predeprivation or prompt postdeprivation notice and hearing and seizes taxpayer's home on the "mere assertion" that the taxpayer may owe Massachusetts sales taxes.

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Appendix

Appendix A

830 CMR 62C.26.1(15)	1a

Pursuant to Supreme Court Rule 15, Petitioner Walter R. Leger submits this Reply to Respondent's Brief in Opposition.

I. ARGUMENT

A. OVERVIEW

The issue before this Court is seizure.

The Commissioner of Revenue of Massachusetts ("Commissioner") seized taxpayer's residence more than three years ago by placing a lien[1] on the property without affording the taxpayer either a predeprivation hearing or a postdeprivation hearing (prompt or otherwise).

This seizure was without any justifiable reason:

(a) there was no determination by an independent body that any taxes were due and owing; and

(b) there was no claim that the future collection of any such taxes, if owed, were in jeopardy unless the taxpayer's home was seized. See 830 CMR 62C.26.1, paragraph (15) attached hereto as Appendix A. Respondent, on page 2 of its Brief in Opposition, admits that the seizing of taxpayer's home was not because the collection of taxes were in jeopardy, but merely as a collection device.

---

1. See Connecticut v. Doehr, 501 U.S. 1, 12 (1991)

The Petitioner wishes to emphasize that, contrary to Respondent's repeated assertions, this is not a tax collection case. It is a "tax assertion" case. The Commissioner is asserting a claim, unproven before an independent body, that taxes are due and owing.

The substantive sales tax issue is not before the Court. Consequently, that portion of the Respondent's Brief in Opposition having to do with a hearing by the Commissioner's Appeal and Review Bureau "upholding the validity of the underlying tax" will not be discussed as it is irrelevant to the issue herein (see Respondent's Brief in Opposition, pages 2 and 12).

The Commissioner asserts that if Petitioner's legal premise is accepted -- that there must be a notice and hearing before an individual is finally deprived of a property interest -- then the trial courts in Massachusetts would be inundated with 70,000 cases for which a hearing would have to be held. See Respondent's Brief in Opposition, p. 3, par. 3.

This observation is interesting for several reasons:

(1) According to the Commissioner's own admission, there are up to 70,000 constitutional violations every year in which the seizing of a taxpayer's property becomes a collection device without any independent determination that any taxes are due and owing or that the collection of taxes are in jeopardy.

(2) The issue is not how many of the audits completed by the Commissioner result in a proposed increased tax assessment, but how may of the completed audits show that the collection of taxes are in jeopardy.

(3) This same "red herring" argument was used by the Commonwealth of Massachusetts and other States when they unsuccessfully tried a similar "doomsday" argument by filing an amicus brief in the case of U.S. v. Good Real Property, 114 S.Ct. 492 (1993); to wit:

> The amici states also believe that this unwarranted interpretation of the Due Process Clause of the Fifth Amendment advanced by respondent, and adopted by the Ninth Circuit, seriously impairs the ability of the states to target the real property assets of the illegal drug industry under their own state forfeiture statutes. (Page 2 of amicus brief)
>
> The Due Process Clause of the Fifth Amendment does not require preseizure notice and hearing since the states' compelling interest in fighting the illicit drug industry outweighs any personal interest in the real property. (Pages 3 and 4 of amicus brief)
>
> ... The holding of the court below -- that seizure must be delayed until notice and an adversarial hearing is provided -- frustrates the governmental interest in protecting the welfare and safety of its citizenry by seizing real property

associated with the illicit drug industry. (Pages 7 and 8 of amicus brief)

B. REPLY TO BRIEF IN OPPOSITION

1. Case Authorities

The substance of Respondent's Brief in Opposition appears to be the reliance on three United States Supreme Court cases: (1) McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 37 (1990); (2) Reich v. Collins, 115 S.Ct. 547 (1994); and (3) National Private Truck Council v. Oklahoma Tax Commission, 115 S.Ct. 2531, 2354 (June 19, 1995).

It should be noted that each of the aforementioned cases illustrate the general proposition that great deference must be left to State courts in determining the appropriate remedy for postdeprivation hearings. However, this Court further held that any deference for State autonomy has limits and that the limitations on Federal causes of action may impose obligations on the States.

The Petitioner agrees with the aforesaid proposition and the conclusions in each of the aforementioned cases.

However, the real issue, which Respondent fails to address, is whether the Commonwealth of Massachusetts, in its so-called postdeprivation proceedings, have, in fact, satisfied the constitutional due process rights to which the taxpayer is entitled on the issue of seizure.

(1) McKesson is quoted by the Respondent, on page 6 of its Brief in Opposition, regarding the proposition that "a State need not provide predeprivation process for the exaction of taxes."

However, the material quoted by the Respondent is taken out of context and ignores the admonition of this Court that even though a State has postdeprivation procedures it still must afford the taxpayer his constitutional rights.

In fact, this Court, in McKesson, after a thorough analysis of postdeprivation procedures in Florida, concluded that Florida, in fact, did not afford the appropriate postdeprivation procedures to insure adequate limitations for State violations of constitutional rights.

Postdeprivation procedure satisfies Due Process if such postdeprivation procedure satisfies Federal constitutional rights.

> This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. McKesson at n. 17.

Petitioner wholeheartedly supports the position set forth in McKesson because it is Petitioner's position that, under the facts presently before this Court, the Commissioner's action was arbitrary and capricious, without any justification.

Consequently, under the McKesson logic, the Commissioner violated the due process rights of the taxpayer herein.

It is interesting to note that the Respondent in quoting McKesson on page 6 of its Brief in Opposition -- "[I]t is well established that a State need not provide predeprivation process for the exaction of taxes" -- omitted the beginning of that very same sentence which reads as follows:

> However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, ..., it is well established ... '"

Therefore, Petitioner believes that McKesson supports his position in that a postdeprivation hearing is allowable assuming it conforms to the guidelines set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), as well as having a postdeprivation hearing within a meaningful time. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) as cited in Petitioner's Petition for Writ of Certiorari, page 21; see also McKesson, n. 22 on p. 39.

(2) In Reich, the Court once again analyzed whether the postdeprivation proceedings of a State (Georgia) satisfied the due process rights of the taxpayer.

> The Georgia Supreme Court is no doubt right that, under McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we

> should add, also allows the State to maintain an exclusively post-deprivation regime. Reich at 550.

In Reich, this Court held that, while a State is allowed postdeprivation procedures, Georgia violated the due process rights of the taxpayer under the Fourteenth Amendment by not having a clear and certain postdeprivation remedy as required.

The Respondent's reliance on Reich, on pages 6 and 8 of its Brief in Opposition, is misplaced. The quoted material is nothing more than part of an analysis of the issue and in both McKesson and Reich this quote, while recognizing postdeprivation procedures, held that in both of the aforementioned cases post-deprivation procedures were inadequate under due process requirements.

(3) National Private Truck Council is the third case on the same issue:

> States are afforded great flexibility in satisfying requirements of due process in field of taxation; ... Id at 2352.

In the National case the Court held that postdeprivation relief did conform to the requirements of due process.

Once again, the Petitioner would like to reiterate that he is in agreement with the proposition that the States may have either a predeprivation hearing or prompt postdeprivation hearing on the issue of seizure so long as certain due process requirements are met.

Respondent once again assiduously avoids the issue in terms of what Massachusetts offers for postdeprivation relief on the issue of seizure.

> Massachusetts provides its citizens with more than ample postdeprivation relief, as any taxpayer may seek an abatement from the Department within one year after paying a challenged tax, ..., may appeal a denial of that abatement to the Appellate Tax Board, ..., may appeal an adverse Board ruling to the Massachusetts Appeals Court, ... See Respondent's Brief in Opposition, p. 7.

None of these postdeprivation "solutions" satisfies the lack of any notice and hearing at any time on the issue of seizure.

2. Jurisdiction

The final point to be considered is the allegation made by Respondent on page 1 of its Brief in Opposition that "the issue was neither actually decided by the Supreme Judicial Court nor properly raised by the taxpayer below."

The question of where and when a Federal question should be raised is set forth in Supreme Court Practice, Seventh Edition, by Robert L. Stern et als:

> Assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the

appropriate point or points in the state court proceedings. Supreme Court Practice at 122, s. 3.17.

This issue of violation of due process rights under the Fourteenth Amendment was raised in the Complaint (see Appendix to Respondent's Brief in Opposition, p. A-14) and argued in Massachusetts Superior Court, Worcester District (see Appendix B to Petitioner's Petition for Writ of Certiorari, p. 10a), as well as having been raised, argued and decided in the Massachusetts Supreme Judicial Court.

Furthermore, if the Respondent is concerned that there had to be a specific reference to a postdeprivation hearing, please note that it was raised and argued in the aforementioned Courts. See Appendix A to Writ of Certiorari, pp. 6a-8a; and Appendix B to said Writ, pp. 18a-20a.

II. CONCLUSION

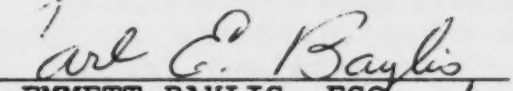
WHEREFORE, it appears that the Commissioner has neither a predeprivation nor any prompt postdeprivation hearing solely on the issue of seizure.

Consequently, the taxpayer's due process rights under the Fourteenth Amendment as set forth in numerous U.S. Supreme Court cases -- including Mathews v. Eldridge, U.S. v. Good Real Property, and Armstrong v. Manzo -- have been violated.

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review

the Opinion and Judgment of the Massachusetts Supreme Judicial Court as entered in this matter.

Respectfully submitted,
Walter R. Leger, d/b/a
Office Chair Maintenance Co.,
Petitioner, by his Attorney



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Dated: February 23, 1996

APPENDIX TO

PETITIONER'S REPLY TO

RESPONDENT'S BRIEF IN OPPOSITION

830 CMR 62C.26.1(15) 1a

APPENDIX A

830 CMR 62C.26.1

(15) Jeopardy Assessments

(a) General. If the Commissioner determines that delay may jeopardize the collection of any taxes, the Commissioner may immediately make a jeopardy assessment according to the Commissioner's best information and belief under M.G.L. c.62C, s.29. The Commissioner may make a jeopardy assessment whether the time otherwise prescribed by law or by regulation for filing the return or paying the tax has expired.

(b) Interest and penalties. A jeopardy assessment will include interest and penalties.

(c) Payment of jeopardy assessment. The amount of a jeopardy assessment is immediately due and payable. The Commissioner will make immediate demand for the amount of a jeopardy assessment.

(d) Collection of a jeopardy assessment. If the taxpayer neglects or refuses to pay the amount of a jeopardy assessment, the Commissioner may pursue any and all available remedies to collect the amount of the jeopardy assessment.

(e) Determination that collection of tax may be jeopardized. A determination that collection of any tax may be jeopardized by delay is made in each instance based on the facts and circumstances of the individual case. The determination is a matter of the

Commissioner;s discretion. The Commissioner may use the following criteria to determine that delay will jeopardize collection, but the Commissioner is in no way limited to these criteria:

1. A taxpayer is arrested by law enforcement officers with substantial amounts of cash, its equivalent, or contraband in the taxpayer's possession, which is or appears to be unreported income;

2. A taxpayer is or appears to be designing to leave Massachusetts immediately or to go into hiding immediately;

3. A taxpayer is or appears to be immediately designing to place the taxpayer's property beyond the reach of Massachusetts' taxing jurisdiction by concealing it, dissipating it, removing it from Massachusetts, or transferring it to some other person;

4. A taxpayer's financial solvency is or appears to be imperiled;

5. A taxpayer fails to file timely returns for and pay withholding, room occupancy, sales, meals, or use tax after receiving notice that such returns are past due, and the Commissioner determines that the circumstances indicate that the tax has actually been withheld or collected and that any further delay will jeopardize the collection of the tax; or

6. Any other reason that in the Commissioner's discretion is sufficient to support the Commissioner's belief that delay may jeopardize collection.

(f) Requirements for a jeopardy assessment. The Commissioner will send a written notice of assessment to the taxpayer under the provisions of 830 CMR 62C.26.1(6)(f)-(i).